CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

OPELOUSAS.

JUNE, 1878.

JUDGES OF THE COURT:

HON. T. C. MANNING, *Chief Justice.*

HON. R. H. MARR,
HON. A. DEBLANC,
HON. W. B. EGAN,
HON. W. B. SPENCER,
} *Associate Justices.*

No. 1015.

SUCCESSION OF ORAMEL HINCKLEY. ON EXCEPTION OF HEIRS.

When the judgment of the lower court on an exception filed to the account of a syndic, is in effect the dismissal of his account, and a refusal to hear his proofs of its correctness, he is entitled on his averment that he can file no other account, to an appeal from the judgment.

An exception to the account of a syndic on the ground of its unintelligibility, should clearly set forth wherein it is amenable to such an objection, and the syndic should be allowed to introduce proofs of its correctness.

APPEAL from the Parish Court of St. Landry. *Fontenot*, J.

E. D. Estilette and *Kenneth Ballio* for heirs and appellees.

Jas. M. Moore for syndic and appellant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. Oramel Hinckley died several years ago insolvent. A meeting of his creditors was called, and they deliberated upon and

determined the mode of settlement of the estate, and appointed Dominique Lalanne syndic. He assumed charge, and has filed his final account of his gestion. Due publication was made of this filing, and the heirs were cited to appear and oppose it, if there should be cause. They appeared, and instead of an opposition, filed an exception, averring that they were unable to understand the account because of its obscurity, and unintelligibility, and because it is not a full and fair account as contemplated by law, and they pray that the syndic be ordered to file another.

They do not specify or particularize the obscurities, nor in what respect the account is unintelligible, nor why they consider it unfair or incomplete. The court sustained their exception, and the syndic appeals. The heirs now move to dismiss the appeal, because it is from an interlocutory order, and works no irreparable injury.

The judgment is in effect a dismissal of his account, and a refusal to receive his proofs of its correctness, and is irreparable, if his averment be true that he can file no other.

The motion to dismiss is refused.

ON THE EXCEPTION.

In October 1871, the syndic filed a tableau of classification of the debts of the succession, and a provisional account of his administration. The heirs opposed the homologation of this tableau and the account, which they subsequently withdrew, and a homologation was decreed, and the syndic was ordered to pay the debts and charges as they were classified. The syndic obeyed this mandate, and the account now filed is a statement of what he did under that decree.

The heirs have not opposed the account specifically, but content themselves with averring their inability to understand it, and do not point out in what particulars it fails to be full or fair. We do not participate in their want of comprehension. On the contrary it appears on its face to have been stated with more than ordinary perspicuity, and completeness.

The syndic was entitled to have the objections to the account set forth with sufficient detail to enable him to know what they were. A general opposition even would put him to the proof of each item, as it is assimilated to the plea of the general issue in an ordinary suit, and would require the production of his vouchers on the trial, or other proof equivalent thereto. The syndic has not had an opportunity to offer any voucher, or to establish the correctness of his account in any way. He is bound only to file an account, sufficiently full and specific as to be in-

telligible to ordinary comprehension. He is not bound to supply the heirs with the faculties which will enable them to comprehend it.

The judgment of the lower court is erroneous. Therefore

It is ordered, and decreed that the judgment of the court *a qua* is avoided and reversed, and the exception of the heirs is overruled and dismissed, and the cause is remanded to be proceeded with according to law, the appellees paying costs of appeal.

No. 1016.

FRANK GONZALES VS. J. T. LINDSAY, TAX COLLECTOR.

When the constitutionality of a tax is at issue, this court has jurisdiction regardless of the amount in dispute.

The justices' courts have authority to issue injunctions in all tax suits brought before them of which they have jurisdiction.

When a party sues in a justice's court to enjoin the collection of an alleged illegal tax, it is not necessary to allege any specific indebtedness by way of damages, in order to give the court jurisdiction.

The police jury of a parish are not a necessary party to a suit brought by the State tax collector to enforce the payment of parish taxes.

An ordinance of a police jury, passed prior to April 20, 1877, imposing a parish tax of over four mills on the dollar for general parochial purposes, and not afterward sanctioned by the vote of a majority of the taxpayers of the parish, is illegal.

APPEAL from the Justice's Court, Third Ward, parish of Cameron. *Gee*, J.

Geo. H. Wells for plaintiff and appellant.

A. J. Kearney for defendant and appellee.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. The appellee moves to dismiss on the ground that the sum in dispute is less than $500, and there is no question of the constitutionality or legality of any tax involved.

The sole question is the legality of a tax, and that gives jurisdiction, regardless of the amount. The motion is frivolous, and is denied.

ON THE MERITS.

An injunction was obtained by the plaintiff to restrain the collection of an alleged illegal tax. The police jury of Cameron parish had levied parish taxes on the assessment rolls for 1876 to an aggregate amount of eighteen mills on the dollar. The plaintiff alleges that this levy, which is in excess of the rate permitted by law, was not sanctioned by a vote

of a majority of the tax payers, and is therefore illegal. He tendered the sum he actually owed, on a levy of four mills on the dollar, in legal tender currency, and injoined the threatened sale of his property for the purpose of collecting the excess of the amount he legally owed.

The defendant excepted to the action, and moved to dissolve the injunction on these grounds;

1. That the court had no authority to grant the injunction.

The writ was issued by the same Justice's court, in which the tax collector had proceeded for the enforcement of the tax, and was the proper tribunal to hear and try the injunction. Justices of the Peace are authorized by express law to issue injunctions in causes within their jurisdiction, and special authority is conferred upon them to take jurisdiction of all claims for taxes when their amount does not exceed one hundred dollars exclusive of interest. Code of Practice, arts. 1063, 1064, 1096, 1126, 1152.

2. That the tax collector had given bond for ten thousand dollars, and as this action is against him in his official capacity, his bond is necessarily attacked, and its amount puts this case beyond the jurisdiction of the Justice's court.

Although we find this ground repeated in the defendant's brief, we doubt if he was serious in urging it. It is wholly untenable.

3. There is no allegation in the plaintiff's petition of any specific indebtedness by way of damages upon which the court could predicate jurisdiction.

Nor need there be. Jurisdiction is given to that court, and to this, by the allegation and the fact that the defendant was about to enforce the collection of an illegal tax by the forced alienation of the plaintiff's property.

4. The defendant derived his authority to collect taxes from the police jury, and that body is a necessary party to any suit to restrain their collection.

That is a mistake. The defendant derives his authority from the legislature, which has made the collector of the State taxes also the collector of the parish taxes. Rev. Stats. sec. 2792.

But if it were otherwise, and he derived his authority direct from the police jury, that body would not be a necessary party to this, or any similar suit.

The resolutions or ordinances of the police jury are illegal and null, so far as they authorize, or attempt to impose, a parish tax greater than four mills on the dollar for general parochial purposes. There are special laws authorizing other special taxes for special purposes. Lafitte v. Morgans, 29 Annual, 1.

The act of 1877, authorizing police juries to levy a tax of ten mills

on the dollar, and an additional tax under certain specified circumstances, was not passed until April 20th of that year. The ordinances of the Cameron police jury, under which the defendant was proceeding, were all adopted prior to that date, and consequently before that body had legal authority to impose a tax of that date.

The lower court sustained the exception, and dissolved the injunction. This is error. Therefore

It is ordered, adjudged, and decreed that the judgment of the Justice of the Peace herein is avoided and reversed, and it is further decreed that the injunction be reinstated, and that the lower court proceed to the hearing of the same. It is also adjudged and decreed that the plaintiff recover of the defendant the costs of appeal.

No. 1017.

MARAIST, FOURNET & CO. vs. C. CAILLIER, ADMINISTRATRIX.

When parties silently acquiesce in and enjoy the benefits of a confession of judgment made in their names by an attorney at law, who has acted in the matter to their knowledge as their representative, they will be estopped from afterward denying the authority of the attorney to represent them.

The makers of a promissory note can not annul a judgment obtained against them on said note by the administrator of a succession, on the ground that the note did not belong to the succession, or on the ground that the administrator was not qualified to act as such.

APPEAL from the Third Judicial District Court, parish of St. Martin. *Fontelieu*, J.

F. & M. Voorhies for plaintiffs and appellants.

Mouton & Martin for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. In the suit of Celestine Caillier, administratrix, vs. Maraist, Fournet & Co., plaintiff obtained judgment against said firm and G. A. Fournet for $558 30, being the amount of their promissory note payable to the order of Joseph Caillier, of whom plaintiff was sole heir and claimed to be administratrix.

The judgment was rendered after answer by all the defendants, in which they confessed their indebtedness. This answer was signed by G. A. Fournet, as their attorney at law. In the judgment it is recited as having been rendered "by reason of the law and evidence being in favor of plaintiff," etc., "and for the further reason that defendants have confessed judgment," etc. The judgment then decrees a stay of execution as to all the defendants until first March, 1878. It was signed 29th May, 1877.

This is an action to annul that judgment, and it was filed March 8, 1878. The grounds of nullity are in substance—

First—That it was rendered on confession contained in the answer filed by G. A. Fournet, attorney at law; that said attorney was without authority to confess judgment, and was not the attorney of said Maraist, Fournet & Co., which firm was composed of three members, A. Maraist, Charles St. Germain, and V. A. Fournet.

Second—That the note sued upon was not the property of Joseph Caillier or of Celestine; but was given to said Joseph Caillier in settlement of a balance due him as executor of Uranie Patin, said executor having surrendered certain mortgage notes of V. A. Fournet in exchange for said note so sued upon.

Third—That said Celestine was never legally appointed or qualified as administratrix of her said deceased father Joseph, and had no right to sue on said note.

We will consider these grounds of nullity in their order.

First—The judgment recites that it was rendered "by reason of the law and evidence" as well as "by reason of the confession." But we are disposed to give plaintiffs the benefit of their proposition that it was rendered on confession. G. A. Fournet was an attorney at law, and the evidence shows that V. A. Fournet and Maraist consulted him about this suit. True, they swear they did not employ him as attorney, or authorize him to confess judgment. V. A. Fournet admits that a few days after the judgment G. A. Fournet told him about the judgment, and that "he had obtained a stay of execution." Auguste Maraist admits that he knew all about the judgment having been rendered. In fact, he was sworn as a witness for plaintiff. He admits that as soon as he got off the witness-stand he retired to a room and called G. A. Fournet and told him to see that a stay of execution was obtained, and G. A. Fournet promised to do so. That the next day on going to the courthouse G. A. Fournet told him he had obtained the stay of execution until first March, 1878. Other witnesses show that Maraist heard the attorney, G. A. Fournet, read the answer in open court. St. Germain, the other party plaintiff in this cause, admits that he knew of the suit, but says he left the management of lawsuits to his partner, Maraist. He says he never authorized any attorney to appear or answer or confess for him.

But there is one fact which to our mind utterly destroys the pretense of plaintiffs in this cause. It is that with full knowledge of the act of G. A. Fournet confessing judgment for them, and knowing that the judgment had been rendered, they quietly avail themselves of the long stay of execution stipulated in their favor—from May to March—nearly a year. During all this time they are silent. They are gathering

the fruits of their attorney's alleged unauthorized acts. When that delay expires and the plaintiff wants her money they suddenly awake and claim that the attorney had no authority. They can not be thus permitted to enjoy the advantages gained for them by the attorney and repudiate the burdens imposed.

This case does not differ in principle from that of Lallande vs. Jones, 14 An. 715, when this court held that the defendant, who availed herself of the stay of execution stipulated for her by her attorneys in a confession of judgment, would not be heard to deny their authority to make the confession.

As to the second and third grounds of nullity, there is no force in them. The note sued upon belonged to Jos. Caillier. It was payable to his order. It did not belong to the estate of Patin. The fact that Caillier obtained it in payment of or exchange for notes of the estate held by him as executor did not make it the property of that estate. He was responsible to that estate for the notes he gave up, and could not have compelled it to take the note he got in return. If that note was lost or worthless, it was his loss, not the estate's.

It needs no argument or authority to show that the want of capacity of Celestine as administratrix of her father's estate is no ground to annul the judgment. It could not have been pleaded even, except *in limine*. Besides, the allegations of the defendants in that suit show that she was sole heir of her father.

There is no error in the judgment appealed from, and it is affirmed with costs of both courts.

No. 1007.

AUG. MARAIST, SYNDIC, vs. HONORÉ GUILBEAU, ADMINISTRATOR.

The homologation by the clerk of the court of a tableau of the debts of a succession filed by the administrator, on which tableau a certain sum is set forth as due to a certain creditor, does not amount to a judgment for that sum in favor of the creditor, and hence does not authorize him to proceed by rule against the administrator to enforce the payment of the sum.

APPEAL from the Parish Court of St. Martin. *Bassett*, J.

F. & M. Voorhies for plaintiff and appellant.

J. E. Mouton and *R. Martin* for defendant and appellee.

The opinion of the court was delivered by

MARR, J. Honoré Guilbeau, administrator, filed a "tableau of the debts and charges of the estate of Dr. John H. Thomas, and of the community which existed between him and his second wife, and proposed distribution of funds, etc."

The gross amount of money to be distributed was $4047 81, proceeds of two sales, of which $192 05 belonged to the estate of Thomas alone, and $3855 76 to the community. The aggregate of debts was $13,370 94, of which $1512 70 were for costs and expenses of administration: $3000, due the widow under the marriage contract, and $7068 02, sums due the children for whom the deceased had been tutor. There is also put down as a debt the sum "due Broussard & Tertrou, two notes and an account, amounting in capital to $1590 07." This was an ordinary debt, while the other debts just enumerated were secured by mortgage and privilege.

After due publication, no opposition having been filed, this tableau was approved and homologated by the clerk of the court, in July, 1866. The record does not show what disposition was actually made of the funds, nor that any further proceedings were had in the succession.

In February, 1877, August Marais, styling himself syndic of the insolvent firm of Broussard & Tertrou, brought suit in the parish court, to recover of Guilbeau personally and as administrator the $1590 07 put down on the tableau. This suit was dismissed, on exception, for want of jurisdiction; and, shortly after, Maraist caused notice to be served on Guilbeau, "that a final judgment of homologation of the tableau of classification in said succession has been rendered on the seventh July, 1866, against you; and, unless you pay, in ten days from the service hereof, the sum of fifteen hundred and ninety dollars and seven cents, due August Maraist as syndic of the late firm of Broussard & Tertrou, according to the tableau of classification, with interest, etc., execution will issue for the amount."

After the expiration of the ten days, a rule was taken in the succession of Thomas, by Maraist against Guilbeau, to show cause why he should not pay the amount of the demand, and, in default thereof, why an execution should not issue against him personally, and his property be seized and sold to satisfy the same.

Guilbeau excepted that the proceeding was not countenanced by law; and that plaintiff could not proceed by rule to obtain the relief sought by him. The exception was overruled, and thereupon the counsel of Guilbeau offered to file the peremptory exception of prescription of five and ten years. The bills of exceptions show that the offer to file this exception escaped the attention of the parish judge; and he proceeded to make the rule absolute. Guilbeau obtained an order of appeal; but subsequently he moved to have the order rescinded, and for a new trial, which was granted. On the new trial the plea of prescription was maintained, and the rule was dismissed; and this is the judgment appealed from.

This entire proceeding is founded on a misapprehension of the law. Prior to the adoption of the existing constitution the clerks of court were authorized to homologate accounts; but the order of the clerk homologating an account was not a judgment against the executor or administrator in the sense of articles 1053, etc., of the Code of Practice. It is manifest that the account or tableau filed by Guilbeau did not propose to pay any sum whatever to Broussard & Tertrou. It would have required more than double the amount of money in the hands of the administrator as shown by that tableau to have paid the widow and children, and the costs of administration. No opposition was filed to this tableau, and the homologation, if it could be termed a judgment, was such a judgment as concluded Broussard & Tertrou, so far as the amount to be distributed as set down in the tableau was concerned; and so far from being a judgment in their favor, against the administrator, it was, if a judgment, one which cut them off from the hope even of any participation in that fund.

The creditors placed upon a tableau of distribution are concluded by the judgment homologating that tableau, so far only as the fund to be distributed under that tableau is concerned; and they can claim under the judgment of homologation only such sum as may be allowed them by that judgment. No sum was allowed to Broussard & Tertrou by the tableau, or by the order of the clerk homologating it; and they were placed on the tableau not in order that they might receive any part of the fund then in the hands of the administrator, but merely for the purpose of exhibiting and classifying the debts of the succession.

By the Code of Practice, articles 1053, *et seq.*, the creditor in whose favor a judgment has been rendered, against a curator, or executor or administrator, for a sum of money, may proceed by notifying such administrator, etc., and by execution against his property, where he has funds of the succession in his hands and refuses or neglects to pay such judgment. The basis, the *sine qua non* of this proceeding is a judgment, for a sum of money, against the administrator, etc. As there was no such judgment in this case, there was no foundation, no legal warrant or authority for the proceeding by notice and rule; and it should have been dismissed on that ground. See Lockhart vs. Wall, 14 An. 274.

It is not necessary to pass upon the plea of prescription, because our conclusion is that the first exception taken by defendant, appellee, should have been maintained, and the proceeding dismissed; and we prefer to put onr decision upon, and to remit it to that ground.

For the reasons stated in this opinion, the judgment of the parish court dismissing the rule and proceeding is affirmed with costs.

Mr. Justice DeBlanc having recused himself, takes no part in this decision.

No. 1018.

PARISH OF ST. MARTIN EX REL. M. BAKER, ROAD OVERSEER, VS. PELLETIER DELAHOUSSAYE.

When the face of the papers sufficiently present the issue involved in an appeal from a justice's court, no statement of facts need appear in the record.

The ordinance of a police jury imposing a fine on persons between certain ages for failing, or refusing to work on the public roads, is constitutional.

APPEAL from the Justice's Court, First Ward, parish of St. Martin. *Easten*, J.

Mouton & Martin for plaintiff and appellant.

E. Simon for defendant and appellee.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. The appellee moves to dismiss for the reason, "that there is no statement of facts to be found in the record of the testimony adduced at the trial, and shewn to have been offered, nor any assignment of error, nor any bill of exception," and for the further reason that the certificate of the Justice of the Peace does not state that the record contains all the testimony adduced.

The first ground stated would be unintelligible, but for our being able to divine its meaning from having seen the same phraseology in many of the transcripts filed here. The ground is, that there is no statement of facts of the testimony. This is a solecism. The only occasions when a statement of facts has a place in a record is when none of the testimony is in it. If the testimony is taken down in writing, (and that practice obtains universally in our courts now), it may and does serve in the stead of a statement of facts. Code of Practice, art. 601.

If the testimony has not been taken down in writing, then and then only, the parties or their advocates must jointly draw a statement of the facts proved, and if they can not or will not do it, the judge must make the statement. *Idem*, arts. 602–3.

There are four modes by which this Court can review a case on appeal. 1. When the testimony has been reduced to writing, and is contained in the record. 2. In the absence of the testimony, when a statement of facts has been made by the parties, or their counsel, or by the judge. 3. When there is a written exception to the opinion of the judge. 4. When a special verdict has been rendered. *Idem*, art. 896.

Most of the transcripts filed here call the note of evidence, 'statement of facts'. How such a misnomer was ever made may serve for the speculation of the curious, but it is apparent that the mover here has

made the same mistake, and that he means to say by way of objection that there is no note of the evidence that was introduced to be found in the record.

The appeal is from a Justice's court. There is no provision for taking down the testimony in writing in a justice's court. He has no clerk, and the pleadings are oral. The parties there, as in the higher courts, can agree upon a statement of facts, and it is their duty to do so. The justice is required to transmit the statement of facts thus agreed on to the appellate court. *Idem*, art. 1135.

We are satisfied none was made or agreed on in this instance, because the face of the papers sufficiently present the issue.

The motion is denied.

ON THE MERITS.

The defendant was summoned to work on the public roads of St. Martin parish, and having refused, incurred a fine of one dollar for each day that he failed to obey the summons. The overseer of the road sued him for four dollars, the fines for as many days of delinquency.

The defendant pleaded a general denial, and the "unconstitutionality of the tax levied upon him," and there was judgment in his favor. The justice has furnished written reasons for judgment, which begin by properly reciting that the action is for the recovery of four dollars forfeiture or fines for having refused to work on the roads, but conclude by ruling that the ordinance of the police jury, imposing the fines, levies a direct tax upon the people, and is therefore unconstitutional.

The justice is in error. Police juries are authorized to pass all ordinances relative to roads, and to impose such fines and penalties to enforce them as they may think proper, and these fines may be enforced by ordinary process in the name of the police jury. Rev. Stats. sec 3364.

The police jury of St. Martin passed an ordinance requiring persons between certain ages to work on the public roads, and imposed a fine of one dollar for each day of failure to work when required. The defendant incurred the penalty denounced by the ordinance, after having been duly summoned, and he must pay for his dereliction of public duty.

One of the surest tests of the civilization of a country is the condition of its public roads. Years ago, at the termination of that period when able-bodied men were needed elsewhere than at home, there was good excuse for impassable roads, but there is no good reason now why those who are liable to road duty should not be made to contribute a part of their time and labor to relieving the country from the reproach of

having highways which are a danger to the traveller, and an obstruction to those who have to transport produce over them.

It is ordered, adjudged, and decreed that the judgment of the Justice of the Peace is avoided and reversed, and it is further decreed that there be judgment in favor of the parish of St. Martin against the defendant Pelletier Delahoussaye for four dollars, and all costs of the lower court, and of this appeal.

No. 1020.

ARCHIE P. WILLIAMS VS. A. GARIGNES, TAX COLLECTOR.

A livery stable keeper who has paid as such, his State license tax, can not be compelled to pay an additional license to the State on the hacks and buggies employed by him in his business.

APPEAL from the Parish Court of St. Landry. *Fontenot*, J.

Kenneth Baillio for plaintiff and appellant.

Jno. N. Ogden for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. In his capacity as tax Collector, defendant has seized and offered for sale two hacks and two buggies belonging to plaintiff, to satisfy the sum of sixty dollars, which said Collector claims as due to the State upon the vehicles thus seized, which—it is admitted—are used by plaintiff in his business as keeper of a livery stable in the town of Opelousas.

The intended sale of those vehicles was enjoined by the owner, on the grounds:

1. That there is no law which authorizes the levying of the licenses claimed.

2. That, if there is such a law, it is unconstitutional.

Plaintiff, it is shown, has paid a license of twenty-five dollars, to pursue his occupation as the keeper of a livery stable, and he contends that no additional license can be claimed from him for keeping and hiring hacks and buggies.

The law under which the collector is attempting to collect these additional licenses is in these words: "From each keeper of a livery stable or yard, or livery and sale stable, with stalls for horses or mules, twenty-five dollars; for every public hack twenty-five dollars, etc."

The stable, the ground on which it is built, the hacks, buggies and horses are assessed and taxed as property, in proportion to their value: an income tax is levied upon the keeper of the public stable, and he can not be compelled to pay—in addition to the tax—a license on every hack,

buggy and horse which he owns, and without which he would be restricted in the pursuit of an already licensed occupation. As well might a merchant be licensed as such, and be made to pay, besides, a separate license to sell hats and shoes, a physician to carry a lancet, an attorney to keep the Codes in his office.

What is a livery stable? A place where horses are groomed, fed and hired, where vehicles are let. Without horses and without vehicles a stable is incomplete. To keep a hack for hire is a calling: to keep a stable and several hacks is another, a different calling: both are taxed alike, and but one license can be imposed by the State on those who pursue but one occupation. Were it otherwise, every industry would soon be discouraged or prostrated.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and plaintiff's injunction perpetuated at the costs of the Tax Collector.

No. 1028.

B. D. Woods & Bros. vs. Chas. J. Pickett et al.

The part owner of a vessel, not interested in her carrying passengers and property for hire, is not liable as a commercial partner for debts incurred for her running expenses.

The part owner of a vessel can not be held even to a *pro rata* liability on a draft drawn by another part owner in the name of the vessel and her owners, for an insurance of the vessel taken out for the benefit and security of a third person; unless he has authorized, or has ratified the drawing of the draft, or profited by it.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Hudspeth*, J.

Lewis & Bro. for plaintiffs and appellants.

Garland & Dupré for defendants and appellees.

The opinion of the court was delivered by

Spencer, J. Plaintiffs sue Charles J. Pickett, C. C. Pickett, James Powers, W. R. Verlander, and Cleophas Comeau as owners of the steamboat Fleta, and as commercial partners engaged in carrying persons and property for hire.

Their demand is for an account of $233 for coal furnished said boat, and the amount of a draft given to the Hibernia Insurance Company, on and accepted by plaintiffs, for $640, being for insurance on "the hull" of said steamer, and signed "C. J. Pickett, for steamer Fleta and owners," date January 12, 1876.

The only defendant before us is Cleophas Comeau. His answer is a

general denial. There was judgment below for him, and plaintiffs appeal. In this court he pleads the prescription of one year against the coal account.

The questions presented for our decision are:

1. Was Comeau a part owner of said steamer, and a partner in the business of running her at the time these debts were contracted?

2. If so, is he liable for them in whole or part?

The testimony on the subject of ownership is voluminous; so much so that to even recapitulate it would transcend the limits of an ordinary opinion. It satisfies us that he was a part owner, and interested in the business of running said boat from the eleventh of June, 1875, and that Roy was simply a person interposed to hold title for him.

The joint owners of a vessel are not partners. But those engaged in running them to carry persons and property for hire are commercial partners. C. C. (old) 2796; 29 A. 345.

Debts incurred, therefore, for running expenses of such vessels are partnership debts, and as to such obligations each partner is the agent of the others, and their rights and obligations are governed by the ordinary rules of commercial partnership. Their liability is solidary.

But it is different with those who are simply joint owners. As we have said, they are not partners, or governed by the rules of partnership. One of these joint owners, as such, has no authority to bind his co-proprietors by drawing drafts or notes in their name; and they will not be bound in the absence of proof of authority so to do, or of some actual and resulting advantage.

Applying these principles to the case before us we find that Comeau as a commercial partner would be liable for the coal bill sued for, if contracted during the existence of his connection with the firm. But the defendant contends that Comeau's connection therewith only commenced on June 11, 1875, and such is the fact. That all coal bought after that date was paid for by payments made thereafter. We find, on inspection of the account, that the amount of coal bought after June 11 was $320, and the sums paid thereafter $320. Defendant can only be charged for items after he became a partner, and is entitled to credit for all sums paid after that event, as it is reasonable to suppose they were paid out of the partnership fund. We think, therefore, that plaintiffs can not recover on this account. It is, therefore, unnecessary to notice the defendants' plea of prescription.

As we have seen, the draft sued upon was drawn by "C. J. Pickett, for steamer *Fleta and owners*," and was for premium for insurance *on her hull*. This can not *by its very terms* be considered a partnership debt. It purports to be for account of the *owners*, who, as we have seen, are not partners. It is for insurance on *the hull* of the boat, which

is not partnership property. The partnership was in the use of the boat. It had no insurable interest in the hull. If, therefore, Comeau is liable on this draft at all, it is for only one third the amount of his interest in the boat. But he is not liable for that unless, first, he authorized Pickett to insure the boat or draw the draft; or, second, has ratified his acts, or derived profit or advantage therefrom.

It is not pretended that he has done either of the first named things.

Has he ratified Pickett's acts or profited thereby? So far as this record discloses, we find no act of Comeau from which we can deduce a ratification. It is shown that when Pickett bought this boat, and before he sold to Comeau, he borrowed $5000 from A. H. May, and gave him a mortgage on the boat. That in that act he agreed and bound himself to keep the same insured for May's benefit. That the boat was so insured, and that the premium for which said draft was given was for a renewal of that policy for May's benefit. The loss in such cases the policy declares shall be paid to May as his interest may appear. We do not see how Comeau could have profited by that policy had the vessel been lost. Certain it is that he has never drawn advantage or profit from it. Under the proofs in this case we think plaintiffs have failed to make out a case of liability on Comeau's part for this draft or any part of it.

The judgment appealed from is therefore affirmed with costs of both courts.

No. 1003.

BOARD OF SCHOOL DIRECTORS VS. O. DELAHOUSSAYE, SR.

Up to the year 1877 the State tax collector was prohibited from paying over any school taxes collected by him, to any one but the treasurer of the School Board, and his payment of any portion of those taxes to the parish treasurer, prior to the year 1877, did not discharge him from liability for them. But when it appears that such payment of school taxes to the parish treasurer was made by a collector in good faith, and was approved by the police jury, and inured to the benefit of the parish, the parish should re-imburse to him the amount thus unduly received.

APPEAL from the Third Judicial District Court, parish of St. Martin. *Fontelieu*, J.

J. E. Mouton for plaintiff and appellant.

Ed. Simon for defendant and appellee.

Robert Martin for the parish, warrantor.

The opinion of the court was delivered by

SPENCER, J. This suit is brought to recover of defendant the sum of $1971 46, the amount of parish school tax of 1873, collected by him

as State and Parish Collector of St. Martin parish during the year 1874 and 1875.

The defendant does not dispute the collection, but claims to have paid over the amount to the parish treasurer of said parish, from whom he received a quietus. Defendant further claims that the parish of St. Martin is bound to warrant and indemnify him against plaintiff's demands, and he prays that the parish be cited, and for judgment in warranty, etc. The parish answers by a general denial, and by averment that if the parish treasurer received said school collections, he had no authority so to do, and the parish is not bound by his acts, done outside the scope of his official duties. There was judgment for defendant, and plaintiff appeals. The facts which are material appear to be as follows:

Baker, the treasurer of the school board, had left the parish, and refused to receive the school funds so collected by defendant, who, thereupon, by advice of the district attorney, paid the amount of the school tax into the hands of Amy, the parish treasurer, in common with, and as other parish taxes, and took his receipt for the gross sum paid. It is shown to our satisfaction that the school tax was included in this payment to the parish treasurer. It is also shown that the police jury in open session on the fifth July, 1875, carefully examined and accepted said settlement between the treasurer and collector. There are but two questions presented for our decision: First, was the payment of the school tax to the parish treasurer a valid payment, and did it discharge Delahoussaye? Second, if not, can he recover the amount thus paid in error from the parish of St. Martin?

First. As to the authority of the parish treasurer to receive the school-fund tax. By section two of act 122 of 1874 tax collectors are expressly prohibited from turning over school taxes collected to any police jury or parish treasurer, or to other person than the treasurer of school board. This was the law in force up to 1877, and is that by which the rights of these parties are to be tested. Subsequent legislation in 1877, making the parish treasurer *ex-officio* treasurer of the school board, can not retroact so as to legalize the payments made in 1875. The collector was bound to await the appointment of another school treasurer if there was none, or to compel the reception of the money by him if there was one. His refusal to receive the funds could not justify the defendant in paying to one not only not authorized but forbidden to receive. We hold, therefore, that payment to the parish treasurer did not discharge defendant, and that he must account to the school board, which has, we think, undoubted right to require it.

Second. The evidence satisfies us that the defendant in good faith paid over the fund to the parish treasurer, and that the police jury approved and accepted that settlement, and that the people of the par-

ish have profited by it. The money thus paid is either yet in the parish treasury, or it has been disbursed for the use of the parish. "He who receives what is not due to him, whether he receives it through error, or knowingly, obliges himself to restore it to him from whom he unduly received it." C. C. (old) 2279. Equity and good conscience forbid that the parish should thus enrich itself at the expense of defendant, who acted in this matter erroneously, but honestly. The parish should protect him, and promptly re-imburse to him or the school fund the amount thus unduly received.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed; and it is now decreed that the plaintiff do recover of the defendant, Onezephore Delahoussaye, the sum of $1971 46, with legal interest thereon from September 13, 1875, till paid, and costs; said sum to be paid to the treasurer of the school funds of the parish of St. Martin; and it is further decreed that the said defendant do have and recover from the parish of St. Martin the like sum ($1971 46), with like interest from same date, together with all costs of this suit.

No. 1005.

A. A. GUILBEAU, TUTOR, ET AL. VS. TRÉVILLE THIBODEAU ET AL.

An action to set aside a sale of real estate made by its deceased owner, on the ground of simulation, may be brought by the executor and forced heirs collectively, or by the heirs separately.

The forced heirs of a deceased person, whose *legitime* is impaired by an alleged simulated sale made by the deceased, are not estopped from attacking the sale on the ground of simulation, but they can only annul the simulated sale to the extent that they are *forced* heirs.

The action against the vendee to annul a simulated sale is not prescriptible.

The amendment to an answer which substantially changes the defense will not be permitted.

APPEAL from the Third Judicial District Court, parish of St. Martin. *Fontelieu*, J.

Mouton & DeBaillou for plaintiffs and appellees.

Felix Voorhies for defendants and appellants.

The opinion of the court on the original hearing was delivered by DEBLANC, J., and on the rehearing by SPENCER, J.

DEBLANC, J. In 1867, on the thirteenth of August, Louis Alexander Potier appeared before a notary public, and signed an act in and by which he acknowledged to have sold to Tréville Thibodeau his plantation and some cattle, for the price of five thousand five hundred dollars. He died shortly after, leaving a testament made on the nineteenth

of September 1866, and—by that testament—gave nearly all he owned to the grandchildren of his aforesaid vendee.

In this suit, plaintiffs—as forced heirs of Potier—attack, as being a simulation, the alleged sale of the 13th of August 1867, the only object of which—they charge—was to deprive them of their *légitime.*

Their action is resisted by defendants on the grounds:

1. That this suit being one in revindication of immovable property could have been brought but by the executor of the last will of Potier, and not by his heirs. In substance and in terms, plaintiffs' action is one "*en déclaration de simulation,*" and that it could have been brought by the executor and forced heirs collectively or by the heirs separately, there can be no doubt.

5 A. 578; 6 A. 223, 673; 15 A. 579, 700, 641; 5 M. 145; 9 M. 351; 2 L. R. 81; 17 L. 118; 4 A. 500; 20 A. 209.

2. That plaintiffs are the heirs of Potier and can not be heard to allege his turpitude. In that capacity, they here claim—not merely as the legal representatives of their ancestor, but from the law; and if they were not allowed to prove a simulation perpetrated to deprive them of their *légitime,* it would not be a difficult task to disinherit them.

15 A. 700; 12 A. 759.

3. That plaintiffs' action is barred by the prescription of five years. If—as contended—the sale from Potier to Thibodeau was a simulation, Thibodeau had—not only no just title to the property apparently transferred, but no title at all, and it is evident that one whose possession springs from and is linked to a simulation to which he is a party, can not acquire by prescription.

The amended answer presented by Flaville Thibodeau was properly rejected by the lower court. In the original one he, as Tréville Thibodeau, avers—in the most positive terms—that the act of the 13th of August 1867 evidences a real and valid sale, and—in his proposed amendment—he avers that said act, which has the form of a sale, which he himself continues to call a sale, was meant as a donation *inter vivos* from Potier to the grandchildren of Tréville Thibodeau.

The only question which now remains to be determined is one of fact: is the sale of the 13th of August 1867, from L. A. Potier to Tréville Thibodeau, a simulation? That it is a simulation can not be successfully disputed: the pretended vendor did not sell, nor intend to sell, the pretended vendee did not buy and no price was paid: the manifest and avowed purpose of the parties was to accomplish—by that act—more than the deceased ancestor could have accomplished by his last will, and that was to disinherit the plaintiffs.

In only one respect the judgment of the lower court is incorrect and must be amended: the property comprised in the simulated act should

not have been decreed to belong to the heirs of L. A. Potier, but to his succession. The deceased could dispose and—it appears—has disposed of a portion of said property, and those who may have acquired rights under his will should not be concluded.

It is useless to examine the other and many defences suggested by the vigilant ingenuity and marked ability of respondents' counsel. Those untenable defences have—for upwards of five years—upheld an attempted injustice and delayed the recognition and enforcement of a plain and incontrovertible right. That is long enough.

It is, therefore, ordered, adjudged and decreed that, in so far as it declares "*that the property in question is that of the heirs of Louis Alexander Potier*," the judgment of the lower court is reversed.

It is further ordered, adjudged and decreed that the act of sale from Louis Alexander Potier to Tréville Thibodeau, passed before Omer Martin, a notary public of the parish of St. Martin, on the 13th of August 1867, be and the same is hereby declared simulated and void, and that the property therein described belongs to the succession of said Potier.

It is further ordered, adjudged and decreed that—as amended—the judgment of the lower court is affirmed; the costs of the appeal to be paid by respondents.

On Application for a Rehearing.

Spencer, J. We are satisfied that the sale from Potier to Treville Thibodeau is simulated, and that it is without effect as to the forced heirs.

But a reconsideration of the question has led us to the conclusion that the plaintiffs can only annul said sale to the extent that they are forced heirs of their grandfather Potier. That beyond that limit they occupy the position of ordinary heirs, and are estopped by the deed of their ancestor, in the absence of a counter letter. See Maple vs. Mitty, 12 A. 759; 4 A. 500, and cases cited.

We think, therefore, that our former decree went too far; and that said sale should only be overruled and set aside to the extent of the fraction thereof for which said plaintiffs are forced heirs. But as the record does not enable us to fix with certainty the fraction for which plaintiffs are forced heirs, the case ought to be remanded to fix it. The rehearing is granted.

On Rehearing.

For the reasons above assigned it is ordered and decreed that the decrees heretofore rendered by the court below and by this be amended

so as to read as follows: It is therefore ordered, adjudged, and decreed that the sale and transfer from L. A. Potier to Treville Thibodeau, of date August 13, 1867, be and the same is hereby annulled and avoided, in so far as and to the extent that it affects the *légitimes* of the plaintiffs in this case, and that the said plaintiffs be decreed owners of the property so transferred to the extent of the fraction for which they are forced heirs of their said grandfather, and that this case be remanded for the sole purpose of ascertaining and fixing that fraction.

It is further ordered that appellees pay costs of appeal, and appellants those of the court below.

Mr. Justice DeBlanc adheres to the original opinion in this case.

No. 1012.

STATE EX REL. VALERY COCE VS. J. A. CHARGOIS.

A district attorney who is a practicing lawyer, is qualified to act as judge *ad hoc* in the trial of a civil case in which the judge is recused.

A lawyer who having accepted the appointment of judge *ad hoc* to try a case, and entered on the trial, afterward refuses to go on with the trial, can not be compelled by mandamus to proceed with the case.

APPLICATION for a mandamus.

Jas. A. Chargois for defendant.

John Clegg for relator.

The opinion of the court was delivered by

MANNING, C. J. A suit was instituted by the relator in the District Court for Lafayette, in which the judge of that court was recused. He therefore called on a practicing lawyer to try the case as judge *ad hoc*, who immediately qualified, and subsequently made sundry orders in the cause. The lawyer thus appointed is the respondent, who is the District attorney for that district. He fixed the cause for trial, but at the time appointed for trial, he recused himself, or was recused, because he was District attorney, and refused to proceed farther. Thereupon the relator applied to us for a mandamus, and upon a rule issuing to shew cause why it should not be granted peremptorily, he assigns for cause:

1. That he is already district attorney, and therefore can not be judge *ad hoc*, because he can not hold two offices of honor or profit at the same time.

This objection is not good. A practising lawyer who is selected to try a particular case, and who acts as judge merely *pro hac vice*, can not be said to hold an office. And he certainly does not hold one of trust or profit. His functions cease the instant the case is at an end, and are

confined to a particular case. There can be no reason why in civil cases the prosecuting officer for the criminal docket should not try a case in which the judge is recused, provided he be a lawyer.

2. The respondent urges that the rightfulness of his recusation can not be inquired into by mandamus, but the party aggrieved should appeal.

If we were to hold that a judge *ad hoc* was an officer, whose failure or refusal to perform his duty could be taken cognisance of by us, in the same way and to the same extent that a judge of one of the inferior courts can, we should certainly issue the mandamus. In other words, if the respondent is right in recusing himself, on the theory that it is another office and he can not hold two offices at the same time, then we might issue the mandamus to him as an inferior judge.

But we refuse the writ on other grounds, viz because of the want of power in this court to compel a lawyer to try a case as judge if he chooses to refuse. The attorney who may be appointed is not obliged to accept the appointment. If he does accept, and even enters upon the trial of the case, he is not obliged to continue to the end. And what he is not obliged to do, we can not compel him to do. True, it is almost *contra bonos mores* to accept, qualify, sit, make orders, and then from caprice, or weariness, or other like cause, incontinently quit the bench, but we are without power to make him go back.

We believe in the present case it was not caprice, but a belief in the incompatibility of the two offices, that occasioned the respondent's action. State ex rel. Fuqua vs. Brame, 29 Annual, 816.

The mandamus is refused at the cost of the relator.

No. 1002.

STATE EX REL. THOMAS W. NELSON VS. ALEXANDER V. FOURNET, ASSESSOR, ET AL.

A party can not be compelled to appear and answer to a suit brought against him in any other district court but that of the parish of his domicile.

A mandamus will not issue to compel the parish assessor, and tax collector to assess a tax. Only the police jury of a parish have power to levy a tax.

APPEAL from the Third Judicial District Court, parish of St. Martin. *Fontelieu*, J.

Breaux, Fenner & Hall for relator and appellant.

G. A. Fournet for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. In the case of Nelson vs. parish of St. Martin, plaintiff obtained judgment against said parish on November 29, 1873, for $4500

and interest, and ordering "the board of assessors, or officers whose duty it is to assess taxes, forthwith to assess a parish tax at a sufficient rate per cent upon the assessment roll of the current year to pay said judgment, and that the tax collector proceed forthwith to collect said tax, etc." On December 27, 1877, Nelson presented his petition "to the judge of the third judicial district court in and for parish of St. Martin," reciting the above-mentioned judgment, and averring that the proper officers of St. Martin had neglected and refused to levy and collect the tax, as therein directed. Wherefore he prays that the parish assessor and tax collector of St. Martin be cited to appear at the court in the town of New Iberia, in the parish of Iberia, there to show cause, on January 2, 1878, why a mandamus should not be made peremptory, directing them to assess and collect a tax as directed by said judgment, etc.

The assessor and collector appeared at New Iberia and filed numerous exceptions and defenses, among which it will only be necessary to notice two.

1. They except that they are citizens and officers of St. Martin, and that the proceeding against them is addressed to the district court of St. Martin, and that they can not be cited and required to appear and answer in the parish of Iberia.

2. That they are without capacity to stand in judgment, for the reason that it is no part of their duty or of either of them to assess and levy parish taxes, that duty belonging exclusively to the police jury. The collector averring that he has no authority to collect until taxes have been legally imposed. We think both these exceptions well taken.

There is no law or authority authorizing the judge of the third district court in and for parish of St. Martin to compel parties to suits pending in that court to appear before him in another parish. The proceeding was *coram non judice*, and void.

It is equally fatal to relator's proceeding that he has not taken it against the necessary parties. The *duty* of the parish assessor is to list and value property, not "to assess taxes" thereon. The police jury should have been cited as the only "officers whose duty it is to assess taxes."

It is unnecessary to pass upon the constitutional questions raised as to the power of the Legislature, in a case like this, to repeal the law authorizing the levy of a tax to pay judgments, after such judgments have been rendered.

For the reasons now stated the judgment appealed from is affirmed at costs of relator.

Mr. Justice DEBLANC is recused in this case.

No. 994.

MAYOR ET AL. OF BREAUX'S BRIDGE VS. VALÉRIEN DUPUIS.

Where the charter of a municipal corporation requires the mayor's sanction to all the enactments of the Board of Selectmen, such enactments will be inoperative unless signed by the mayor.

The promulgation of an ordinance enacted by the Board of Selectmen of Breaux's Bridge, by merely posting the ordinance, is without effect, when the ordinance has not been signed by the mayor, and by the secretary of the board.

No law or ordinance passed by a town council can have any binding effect unless promulgated and preserved in the English language.

When the fact is denied that a certain ordinance has been enacted by a town council, the fact can only be proved by the deliberations of the council, and their promulgation, duly attested.

APPEAL from the Parish Court of St. Martin. *Bassett*, J.

F. Voorhies for plaintiffs and appellees.

Mouton & DeBaillou for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. This suit is brought to recover from the defendant the sum of fifty dollars, which plaintiffs claim by virtue of an ordinance adopted by the Town Council of Breaux's Bridge, on the 3d of December 1877. That ordinance was written, presented, promulgated and preserved in the French language, and is not signed by the mayor.

The tenth Section of the act amending the incorporation of the town of Breaux's Bridge provides "that the mayor shall *sanction* all laws and ordinances passed by the Board of Selectmen." That sanction must be expressed otherwise than by suing to recover the amount of a license imposed by said laws and ordinances, *which are not published in any official paper*, but merely placarded in different parts of the town. The council's enactments and their promulgation must bear the signatures of the Mayor of the Town and of the Secretary of the Board. Without at least one of the signatures of those two officers, no one could be legally informed of the adoption of those enactments, and —without both of them—the promulgation by mere posting was a vain formality.

In this instance, to prove a fact which must be shown by the book to be kept by the Secretary, he had to be called and examined as a witness, and testified that two of the members of the Board have voted for the ordinance. When denied, such a fact can be established but by the deliberations of the Board and their promulgation duly attested by the signatures of the mayor and secretary.

The Council's ordinance imposing the license sought to be recovered is a law, a legislative proceeding, and—though its promulgation in the language understood and spoken in the locality wherein it was

adopted was proper *and authorized*, the 109th article of the Constitution of 1868, which differs from Sect 15 of title VI of the State Constitution of 1812, commands that all laws and legislative proceedings shall be promulgated and preserved in the English language.

In the case of Loze vs Mayor reported in the 3d La and relied upon by the counsel representing plaintiffs, this court held that only the laws passed by the Legislature of the State were to be promulgated in the English language. That decision was certainly correct, as then such a promulgation was limited by the Constitution to "all laws that may be passed *by the Legislature*."

That plain provision of the Constitution of 1812 has been intentionally changed by as plain a provision of the Constitution of 1868, and now—unless promulgated and preserved in the English language—no law or ordinance, whether passed by the Legislature or a Town council —can have any binding effect.

C. of 1868, art 109.

It is therefore ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and plaintiffs' demand rejected with costs in both courts.

No. 1031.

JACOB C. VAN WICKLE vs. O. H. VIOLET AND WIFE.

It will be presumed that the community of acquets and gains exists between the husband and wife until the contrary is shown.

Neither the wife nor her separate property can be held liable for supplies furnished to her husband for the cultivation of her plantation, unless it be proved that the wife herself cultivated her plantation, or that it was cultivated for her account and benefit. The mere fact that the creditor kept the account for the supplies against the husband as agent of the wife, does not prove the agency.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Hudspeth*, J.

E. Simon and *James M. Moore* for plaintiff and appellant.

Garland & Dupré for defendant and appellee.

The opinion of the court was delivered by

MARR, J. This is a suit against husband and wife, on a note drawn by them jointly to their own order, and by them indorsed, secured by mortgage of the same date, March 7, 1872.

The petition charges that the wife was separated in property from her husband by judgment; but when this was rendered, or in what court, there is nothing in the record to show.

Default was taken against Violet. Mrs. Violet, after denying all the allegations of plaintiff's petition, except that she signed the note sued on, specially denied her liability for the amount of the note, as it was given to secure advances made and to be made to her husband; and she also denies her liability on the mortgage granted to secure the note, alleging that the property mortgaged is paraphernal, and was owned by her before her marriage.

The evidence consists of the note and mortgage, the deposition of Mouton, the mortgagee, and the testimony of Félix Dessan, the father of Mrs. Violet, who proves that Violet had no means, to his knowledge.

Mouton testified that the note and mortgage were given to secure advances made and to be made for the plantation of Mrs. Violet; and that all his dealing was with Violet as agent of his wife. He attached to his deposition an account current, kept in the name of "O. H. Violet, agent," beginning May 29, 1871, footing on the debit side $2100 55, credits $1117 11, balance brought down to May 31, 1873, $983 44, with memorandum at the foot, "Hold your mortgage for $1000, as collateral security."

The judge of the district court was of opinion that the evidence was not sufficient to charge Mrs. Violet; and we are of the same opinion.

The R. C. C., 2398, declares that "the wife, whether separated in property by contract or by judgment, or not separated, can not bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage."

The answer of Mrs. Violet puts at issue all the allegations of the petition except that she signed the note. The legal presumption is that community exists in all cases, where it is not excluded by contract, or dissolved by judgment: and it is also a legal presumption that all debts contracted during the marriage are debts of the community, for which the wife is forbidden to bind herself or her property.

The fact that Mouton dealt with Violet as agent for his wife by no means proves that he actually was her agent, or that he had authority to bind her. The paraphernal lands of the wife might be cultivated by the husband for his account, or for account of the community; and in neither case would the wife be liable for expenses and debts incurred.

In order to recover of the wife there must be proof that the consideration inured to her separate benefit. Conrad vs. LeBlanc, 29 An. 124, and cases there cited. It is not proven that Mrs. Violet cultivated any plantation, or that any was cultivated for her account and benefit.

There is nothing in the record to rebut the presumption that community existed between Violet and his wife; and that the debt is one for which she is forbidden by law to bind herself or her property.

The judgment appealed from is therefore affirmed with costs.

No. 1024.

A. TERTROU VS. C. C. DURAND ET AL.

The purchaser at public sale of succession property on which he has a first special mortgage, is entitled to retain possession of the purchase price, on executing his bond with solvent security in favor of the administrator, for a sum to be fixed by the court, conditioned that he shall pay such sums as may be ascertained, on a settlement of the succession, to be payable by preference to him out of the proceeds of the property so purchased by him, up to the amount of his bid.

The institution of executory proceedings on a mortgage note will interrupt prescription of the note, unless the proceedings are dismissed on motion of the plaintiff.

APPEAL from the Parish Court of St. Martin. *Bassett*, J.

J. A. Breaux and *L. J. Gary* for plaintiff and appellee.

F. & M. Voorhies and *E. Simon* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. This case was before us last year, and is reported at page 506, 29 An., where the objects and purposes of the suit are fully stated, and need not be here repeated. The case was then remanded, and is now before us after having been tried, resulting in a judgment for plaintiff, from which this appeal is taken.

The evidence shows that Tertrou is the holder of two special mortgages on the property sold, to wit: that in favor of LeBlanc, for $2816, and that in his own favor for about $16,879 60. These are the first special, and, so far as appears, the only special mortgages, on the property. At the probate sale of the succession of Charles Durand, Jr., certain lots (described by plaintiff) of the property subject to his mortgages were adjudicated to Tertrou for $10,134. The sheriff and C. C. Durand, administrator, demanded of him, *eo instanti*, the full amount of his bid, in cash. He claimed the right, as first special mortgage creditor, to retain the amount of his bid until the final liquidation and settlement of the estate, upon giving security for such amount as might be fixed as preferred to him. The sheriff, thereupon, at once re-offered the property, without delay, and the same was purchased by C. C. Durand, the administrator, and John Durand, heirs of the deceased, for the sum of $2200. Under the view we have taken, this second adjudication is void. Tertrou was entitled to retain the amount of his bid until the amount of claims preferred to his, and exigible out of the property, was ascertained. There is a large amount of property which has not been sold, and which may, perhaps, suffice to satisfy all antecedent privileges and general mortgages. The defendants have pleaded the prescription of five years against the Tertrou claim. It is admitted that Tertrou, in July, 1872, took executory process on his notes and mortgage, which was duly

served on the administrator. This process was enjoined, and it is said that Tertrou voluntarily dismissed and abandoned it. We find that the order of dismissal of date May 29, 1877, was rendered on motion of C. C. Durand, administrator, and not on motion of Tertrou. This executory proceeding and the injunction during its pendency interrupted prescription, and it began to run *de novo* only from that date. The plea of prescription is, therefore, not sustained.

We think the judgment appealed from is correct, except that it should have fixed the amount and conditions of the bond to be given by Tertrou. It should be amended in that respect.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended, as follows: that before the sheriff delivers the deed and possession of said lands to Tertrou, and as condition precedent thereto, the said Tertrou shall execute, with good and sufficient security, in favor of the administrator of estate Charles Durand, Jr., his bond in the sum of seven thousand five hundred dollars, conditioned that he will pay and satisfy such sums as may be fixed and ascertained on settlement of said estate to be payable by preference to him out of the proceeds of the lands so purchased by him up to the amount of his bid, said bond to be approved by the parish judge of the parish of St. Martin.

It is further ordered that, as thus amended, said judgment be affirmed. The costs of appeal to be paid by appellee.

No. 1009.

URSULE BROUSSARD VS. LEO DITCH AND SHERIFF.

When a succession owes no debts, and is composed exclusively of community property, and there is a surviving spouse, an administrator should not be appointed; and if appointed, a sale provoked by him of the property may be enjoined by the surviving spouse.

APPEAL from the Parish Court of Vermilion. *Kibbe*, J.

R. P. O'Bryan for plaintiff and appellant.

F. R. King for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. Leo Ditch the elder, husband of the plaintiff, died in 1867, leaving several minor children, of whom his widow, their mother, qualified as natural tutrix. His property was inconsiderable—about twelve hundred dollars in value—and was all community, and all movable, and he owed no debts. The plaintiff qualified as natural tutrix to her children, and has not married again.

Leo, the eldest child, attained majority two or three years ago, and applied for administration of his father's estate. Opposition was made to it by his mother, the surviving widow in usufruct and natural tutrix of the other children, upon various grounds, one of which is that there was no necessity for an administrator to be appointed, since she in her capacity of tutrix was doing, or had done, all that was necessary to be done by any representative of the succession. Nevertheless her opposition was rejected, and the applicant was appointed, and she has brought her appeal from that judgment before us in another case.

The administrator, thus appointed, applied for and obtained from the parish court an order of sale of the whole property, and the widow injoined the sale thus ordered. That is the present suit.

What possible grounds can be supposed to exist to justify an order of sale of property thus owned and situated, we are at a loss to conjecture. The father had been dead nearly, if not quite, ten years when the application for administration was made. No creditor asked for an administration, for there were none. The property was in the possession of the widow, who owned absolutely one half of it, and who as usufructuary was entitled to the possession of the other half. A sale of her moiety, under the circumstances developed in this case, would have conveyed no title. A sale of the children's moiety would have imperilled their scanty heritage. What that heritage was, and how acquired, the widow herself shall tell, as on the witness stand she confronted the first fruit of her womb, who was seeking to despoil her of her only support;

"Leo Ditch jr. is my son, issue of my marriage with Leo Ditch Sr. * * * We were married, Leo Ditch and I, twenty-five years ago last January. He died of yellow fever in Oct. 1867. The only property he left at his death was cattle, four jars, one spinning wheel, one shot gun and one mattrass. I was told that he branded thirty calves the year of his death. I sold the calves every year to support and maintain the children, also some old cows and a very few beeves. I never kept any account of the number. Leo Ditch can say better than I can, for he is the one who always sold them for me, except the last year. I can not say whether there were any debts due my husband or not at the time of his death. I can not say either, whether my husband owed any thing or not when he died. He had nothing but his clothing when we married, and not much of that."

On cross-examination she says she spent the money realized by the sale of the cattle in support of the children, such as their food, schooling, books, medicines and doctor's bills. She owned at the time of her marriage six cows, a branding iron, and ten dollars in specie, and with the memory for small matters that characterizes those in her lowly condition, and the *naïveté* that is both a consequence and an evidence of the

frank simplicity of her nature, she says that she gave the specie to her young husband who bought a cow with it.

As he had nothing, the whole of the stock must have been the issue of the six belonging to his wife, the one bought with her money, and those bought subsequently with the profits, if any were thus bought.

The case resembles that of Burton v. Brugier, recently decided by us, *ante*, 478, and the principle of law controlling it is well established. When the succession owes no debts, and is composed exclusively of community property, and there is a surviving spouse, an administrator should not be appointed, and if appointed, a sale provoked by him of the property is properly prevented by an injunction by the owner and usufructuary. In that case, damages were awarded the widow against a purchaser of the property under circumstances very like these, who had evicted her by violence. The arrest of the sale by the process used in this suit has probably saved another purchaser from a similar fate. Therefore

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and the injunction sued out by the plaintiff is maintained and perpetuated, it is further adjudged that she have and recover of the defendant Leo Ditch the costs of both courts.

ON APPLICATION FOR REHEARING.

MARR, J. Counsel for appellees bases his application for rehearing mainly on the ground that our decree disposes of the case on the merits; whereas the judgment appealed from was rendered on exception to the jurisdiction of the parish court *ratione materiæ*.

The parish court erred in maintaining this exception. That court had granted an order of sale, at the instance of Leo Ditch, in his capacity as administrator; and no other court had jurisdiction to enjoin that sale.

We have decided that Leo Ditch is not administrator; and he can not proceed with the sale. There is no issue of law or of fact upon which the order of sale enjoined in this case could be enforced or justified; and as the parish court had jurisdiction to grant the injunction, there is nothing now to be tried and the injunction is perpetuated, *ex necessitate*.

The rehearing is refused.

No. 1030.

STATE EX REL. MERCHANT VS. TAYLOR DASPIT ET AL.

Where a tax collector is superseded, and his successor collects part of the taxes embraced in the tax rolls, and blank licenses put into his hands, the outgoing collector and his sureties will be liable only for the amount collected by him, and not accounted for; which amount must be proved by the State.

An attorney in fact can not bind his principal as surety, unless he is specifically authorized to do it.

APPEAL from the Third Judicial District Court, parish of St. Martin. *Fontelieu*, J.

W. B. Merchant for plaintiff and appellee.

E. Simon, J. E. Mouton, L. J. Gary, and *G. A. Fournet* for defendants and appellants.

The opinion of the court was delivered by

MARR, J. This is a suit to recover of Taylor Daspit, tax collector of the parish of St. Martin, $22,356 88, for alleged defalcations; and against his sureties, Joseph Gautreau and Mrs. Marie Amélie Béraud, and Louis Laloire, her husband, $20,000, on the bond in which Gautreau and Mrs. Laloire were sureties, each for $10,000.

Daspit was appointed tax collector for the parish of St. Martin, in March, 1875. He gave bond, with Joseph Gautreau and Mrs. Laloire as sureties, each in the sum of $10,000. He collected the taxes of 1870, 1871, 1872, 1873, 1874; and, as Jumel, Auditor, testifies, "he paid the same into the treasury, and his accounts appear upon the books as settled."

The rolls for 1875, for taxes assessed, and licenses furnished him, amounting to $22,356 88, were placed in his hands; and the object of this suit is to make him and his sureties liable upon the ground that he failed to account for any part of this amount.

The proof shows that on the sixth April, 1876, Numa Bienvenu was appointed tax collector for St. Martin; and that he collected the greater part of the taxes for 1875.

We think that where a tax collector continues in office, no proof of defalcation on his part is necessary beyond the tax rolls and licenses placed in his hands; and that he is bound to account; and in default of his accounting he will be legally liable for the whole amount. But it is manifest that where the tax collector is superseded, and his successor collects part of the taxes, the out going collector and his sureties are liable only for the amount collected by him and not accounted for; and the tax rolls, and blank licenses put in his hands would not be sufficient evidence either against him or his sureties.

It appears from the testimony of Jumel, the Auditor, that Bienvenu, the successor of Daspit, filed affidavits with the Auditor, showing

that Daspit collected part of the taxes of 1875, in all $8102 38. But this is merely Jumel's statement of what the affidavits of Bienvenu were; and this is mere hearsay. Bienvenu should have been called as a witness.

In 1870, Mrs. Marie Amélie Béraud, wife of Louis E. Laloire, and her brother, Felix Béraud, and her sister, Eugénie Amelia Béraud, gave to Louis E. Laloire a power of attorney which is quite full. It does not, however, contain any power or authority to the attorney to bind his constituents as sureties, for any purpose whatever.

Under this power, Laloire signed his wife's name, five years after its date, to the official bond of Daspit as tax collector. It was a gross abuse of the power, and of the trust and confidence reposed in the husband by the wife. It could not have entered into the contemplation of the parties, in 1870, that the power then granted, evidently to enable the husband to manage his wife's business and for her interest, would authorize him to bind her as security for others, especially for a tax collector appointed in 1875, five years after the date of the power.

Mrs. Laloire was not one of the sureties for Daspit in his official bond; and she should not have been accepted as such.

The judgment of the district court was in favor of the State, against Daspit, for $22,356 88, subject to a credit of $3310 35, of the taxes of 1875, proven not to have been collected; and against Joseph Gautreau and Mrs. Marie Amélie Béraud, wife of Louis E. Laloire, each for ten thousand dollars, with recognition of mortgage on their real estate, from the date of the bond, March 16, 1875: and all the defendants appealed.

As we have seen, the legal presumption which would have existed against the tax collector that he was bound for the whole of the tax rolls and blank licenses furnished to him can not be invoked in this case. The taxes of 1870, 1871, 1872, 1873, 1874, collected by Daspit, were fully accounted for. The taxes of 1875 were collectible in 1876; and on the sixth April, 1876, Bienvenu was appointed the successor of Daspit: so that it was impossible for Daspit in his official capacity to have collected the taxes of 1875.

As the State had deprived him of the legal right and power to collect the taxes, by appointing a successor, it was incumbent on the State to show, by proof, the amount of taxes collected by him. The only proof on that subject is the Auditor's testimony of what is shown by affidavits of Bienvenu, the successor of Daspit, part of the records of the Auditor's office, neither the originals nor copies of which were produced. The State should have called Bienvenu and the taxpayers, as witnesses to prove the amount of taxes collected by Daspit up to the sixth April, 1876, in order to have held the sureties in his official bond,

or the sums collected by him after the appointment of his successor, not accounted for by him, to have recovered of him alone.

The district court should have released Mrs. Laloire from liability, because she was not one of the sureties on the official bond of Daspit; and there should have been judgment of nonsuit against the State, and in favor of Daspit and Gautreau.

It is therefore ordered, adjudged, and decreed that the judgment of the district court appealed from be annulled, avoided, and reversed: and proceeding to render such judgment as should have been rendered by the district court, it is further ordered, adjudged, and decreed that there be final judgment against the State, in favor of Mrs. Marie Amélie Béraud, wife of Louis E. Laloire, rejecting the demand against her; and that there be judgment against the State, in favor of Taylor Daspit and Joseph Gautreau, dismissing the demand against them respectively as in case of nonsuit, with costs in both courts.

No. 1010.

QUEYROUZE & BOIS ET AL. VS. P. E. THIBODEAUX ET AL.

In an action to annul a *dation en paiement* of certain property worth more than $500 the district court has jurisdiction, although the debt due the creditor who sues to annul is less than $500.

A *dation en paiement* of property unaccompanied by its delivery, is void.

A *dation en paiement* made by a father to his children, by which he divests himself of all means of support, is void.

A *dation en paiement* made by a debtor which leaves him nothing with which to pay his other debts, thus making him insolvent, is void.

The action to annul a *dation en paiement* which was simulated, and thus void *ab initio*, is not subject to the prescription applicable to the dispositions of property that are real, but fraudulent as to creditors.

APPEAL from the Third Judicial District Court, parish of St. Martin. *Fontelieu*, J.

Mouton & Martin for plaintiffs and appellees.

L. J. Gary for defendants and appellants.

The opinion of the court was delivered by

MARR, J. In August, 1876, Queyrouze & Bois obtained judgment in the parish court of St. Martin, against O. E. and Paul E. Thibodeaux, *in solido*, for $383 01 with interest and costs; and in May, 1877, Bodet & Gueydan Bros. obtained judgment in the district court of the same parish, against the same parties, for $729 96, with interest and costs.

These creditors, and Larose, a creditor by open account, brought suit in the district court of St. Martin, against Paul E. Thibodeaux personally, and as tutor of his minor children, and against other persons

his children either of age or emancipated by marriage, to have declared null a certain *dation en paiement* made by him to his children, by notarial act of date 12 January, 1874: and to subject the property given in payment to their respective judgments and claims.

The petition charges, substantially, that Thibodeaux was indebted to Queyrouze & Bois for merchandise sold to the commercial firm of which he was a partner from January to June, 1873: to Larose for merchandise sold 29 January, 1873; and to Bodet & Gueydan Bros. for merchandise sold during the year 1873:

That Thibodeaux "pretends to have sold and did pass an act of sale by *dation en paiement*, to his minor children," for the sum of $1800, all his property, movable and immovable, consisting of several tracts of land, domestic animals, etc.:

That this pretended *dation* was made and effected by fraud and collusion, for the purpose of defrauding petitioners: That it is null and void, for the reason that no previous inventory or appraisement of the property had been made: That the parties appearing as purchasers were, and some of them still are minors, not emancipated; and all such contracts are null and void *ab initio*.

That since said pretended dation Thibodeaux has continued to be and is still in the undisputed possession of the property, the value of which far exceeds the price mentioned. Various other causes of nullity are set up, among others, the incapacity of the tutor to contract with the minors: the failure of Thibodeaux to have the rights of the minors fixed, by administration of the succession of their mother; and the want of consideration.

The prayer is that the pretended *dation en paiement* be declared to have been made in fraud of the rights of petitioners, and to be null and void *ab initio*.

Defendants answered by general denial; and they afterward pleaded the prescription of one and three years, in bar of plaintiffs' action.

The judge of the district court was of opinion that the claim of Larose was subject to the prescription of three years, and was barred. The decree was that the dation be avoided and annulled, in so far as regards the judgment claims of Bodet & Gueydan Bros., and Queyrouze & Bois: and the defendants appealed.

Our attention is called to the fact that the demands of Larose, and Queyrouze & Bois are, each, for less than $500; and it is urged that the district court was without jurisdiction as to them. This would be true if the object of the suit had been to recover of defendants the amount of these claims: but plaintiffs had no such object; and they prayed for no other judgment than one declaring the nullity of the dation. The amount in dispute was the value of the property.

The claim of Larose may be prescribed; but the plea of prescription in this case was against the action of plaintiffs: and that action was not to recover the money due them, but for the nullity of the dation.

It was proven that Thibodeaux continued to live in the same house, and with all his children, as before the dation; so that there was no apparent change of possession. The mere description of the property, aggregating 436 superficial arpents, one of the tracts, at least, cultivated as a plantation, fronting on the Teche, to say nothing of the buildings, fences, agricultural implements, horned cattle, horses, colts, mules, hogs, leaves no doubt of the insignificance of the price; and it can not be considered as real or serious. Four of the children were minors at the time the dation was made, and two were married women. The act provides that the property shall remain in common, *en communauté*, until the majority of the minors, one of whom is now about thirteen years of age.

There is room for grave doubt as to the reality of the indebtedness of Thibodeaux to his children; and this doubt is increased by the fact that there has been no administration of the succession of their deceased mother, no inventory, no proceedings establishing any indebtedness of their father to them.

The law forbids the giving in payment, by an insolvent, to one creditor to the prejudice of others, any other thing than the sum of money due; and the proof in this case is that Thibodeaux, by this dation attempted and intended to vest in his children a title to all that he had, reserving nothing whatever to himself. Living in the house with his family, all his children, himself the head of the family, a mere paper conveyance would not be such a delivery as is indispensable to the giving in payment; and the stipulation that the entire property should remain in common until the majority of the minors indicates clearly his intention to divest himself of the title and control nominally only, while in reality he would enjoy the benefits of actual ownership, and keep his family with him as he has continued to do. We entertain no doubt that this dation was a pure simulation: that it was void for want of delivery: R. C. C. 2656: that it was also void, because the effect, if it had been real, would have been to divest the father, the head of the family, of the means of support, it would not have left him a bed or a chair: that it was void because he retained nothing with which to pay his debts, and it made him insolvent; and that the action to have it declared void *ab initio*, as it really was, is not subject to the prescription applicable to conveyances and dispositions of property, real but fraudulent as to creditors.

The rights of the children of Paul E. Thibodeaux, such as they existed prior and up to the date of the *dation en paiement*, 12 January, 1874, will be in no manner affected by this decree, and are reserved just

as they were at that time and as they would have been if no such dation had been made.

For the reasons herein stated, the judgment appealed from is affirmed with costs.

No. 999.

EDWARD FOREMAN VS. W. G. SAXON ET AL.

A wife, even separate in property, is incapable of either buying or selling property, unless her husband concurs in the act, or yields his consent in writing.

The record of a written agreement to sell certain property does not amount to a sale of the property.

APPEAL from the Third Judicial District Court, parish of St. Mary. *Fontelieu*, J.

M. J. Foster and *D. Caffery* for plaintiff and appellee.

Fred. Gates for defendants and appellants.

The opinion of the court was delivered by

MARR, J. Mrs. Pecot, the owner of a plantation, the legal title to which stood in her name, agreed to transfer one undivided third of it to Mrs. Mallon, in consideration of the abandonment by Mrs. Mallon of certain suits and claims affecting the property. This agreement was dated April 8, 1876, and was recorded on the eighth March, 1877.

Mrs. Mallon transferred her interest in this, and certain other property, to Edward Foreman, for the price of $3000; and this transfer was recorded on the seventh March, 1877, the day after its date.

Mrs. Pecot, by notarial act, reciting the agreement between herself and Mrs. Mallon, and the performance by Mrs. Mallon of her part of that agreement, conveyed to Edward Foreman, assignee of Mrs. Mallon, one third of the plantation, fixed and designated by metes and bounds; and this title was recorded on the twenty-first March, 1877, the day after its date.

On the fifth March, 1877, W. G. Saxon caused to be recorded a decree of this court, rendered in June, 1874, in the suit of Mallon and wife vs. Gates, condemning Mrs. Mallon and her sureties to pay to Gates $500 in damages for the wrongful obtaining of an injunction. Saxon was one of the sureties; and on the ninth March, 1877, he caused execution to issue against Mrs. Mallon, on this decree, in his favor as subrogee of Gates, under which the sheriff seized and advertised for sale the one third of the plantation acquired by Mrs. Mallon under the agreement of April 8, 1876.

Foreman enjoined the sale, claiming to be the owner, in virtue of the transfer to him by Mrs. Mallon, and the subsequent conveyance by Mrs. Pecot. The district judge was of the opinion that the recording of the

decree of this court, on the fifth March, 1877, created a judicial mortgage in favor of Saxon, but that he could proceed to enforce it only by the hypothecary action; and he perpetuated the injunction, "reserving to defendant his right to proceed by the hypothecary action." Saxon appealed from this judgment; and Foreman, appellee, in answer to the appeal, prays that the judgment be so amended as to strike out that part of it reserving to appellant the right to proceed by the hypothecary action.

Appellant maintains that the transfer by Mrs. Mallon to Foreman is absolutely null and void, because it was made without the authorization of her husband; and that it was fraudulent and simulated.

The record contains no evidence of fraud or simulation. The price was $3000, for which Foreman gave to Mrs. Mallon his note, bearing eight per cent interest from date; but this does not establish either fraud or simulation.

The Revised Civil Code, article 122, declares that "the wife, even when she is separate in estate from her husband, can not alienate, grant, mortgage, acquire, either by gratuitous or incumbered title, unless her husband concurs in the act, or yields his consent in writing."

The prohibition to acquire is as absolute as the prohibition to alienate; and if, by reason of the failure of the husband to concur in the act, or to give his consent to it in writing, the transfer by Mrs. Mallon to Foreman was void, it inevitably follows that the agreement between Mrs. Mallon and Mrs. Pecot was void for the same reason.

In reality, no title to the property in question ever vested in Mrs. Mallon. The agreement required her to dismiss certain suits, and to abandon certain claims, in consideration of which Mrs. Pecot promised to transfer the property to her. The performance of this agreement by Mrs. Mallon, if she had the capacity to make the agreement, and to comply with the terms, would not have vested the title in her: it would merely have authorized her to sue for specific performance by Mrs. Pecot, or for damages for non-performance. The recording of the decree against Mrs. Mallon did not create a judicial mortgage on the property in question, because Mrs. Mallon did not own it: and if she had been authorized, or was legally competent to make the agreement with Mrs Pecot, the recording of the decree would have been no obstacle to the transfer by her to Foreman.

One of two consequences results: Either Mrs. Mallon acquired no right under the agreement with Mrs. Pecot, because of her incapacity; or all the rights flowing to her from that agreement had passed to and vested in Foreman before the execution enjoined was issued. In either case Mrs. Mallon had no property or right under that agreement subject to seizure under that execution.

The title and ownership of the property were in Mrs. Pecot. She was satisfied to part with the one third for the benefits and advantages promised by Mrs. Mallon; and she was content, after having received that consideration, to make the conveyance to Foreman, the transferee of Mrs. Mallon, which she had promised to make to Mrs. Mallon. We know of no principle which would authorize any creditor of Mrs. Mallon to treat this conveyance as a nullity, or to subject the property, simply because of Mrs. Mallon's want of capacity, since she was as competent to alienate as she was to acquire.

The judge of the district court erred in reserving the right of appellant to proceed against this property by the hypothecary action. He never had that right, because the agreement between Mrs. Mallon and Mrs. Pecot did not create any such right in Mrs. Mallon as could be affected by judicial mortgage.

The judgment appealed from in so far as it reserves to appellant the right to proceed against the property in question by the hypothecary action is annulled, avoided, and reversed; and, in all other respects, it is affirmed with costs.

No. 996.

ELISÉE THIBODEAUX VS. ADOLPHE COMEAU AND WIFE.

A defendant who excepts to the capacity of the plaintiff to stand in judgment does not waive the benefit of the exception by failing to require the court to rule on it before passing to the merits.

The dative testamentary executor alone can not maintain an action to revoke a donation *inter vivos* made by the deceased, on the ground that the donees have not fulfilled the conditions of the donation. The heirs of the deceased are necessary parties to such an action.

APPEAL from the Third Judicial District Court, parish of St. Martin. *Fontelieu*, J.

C. H. Mouton for plaintiff and appellant.

E. E. Mouton, Felix Voorhies, and *J. E. Mouton* for defendants and appellees.

The opinion of the court was delivered by

MANNING, C. J. On the 5th. of June 1869 Elisée Thibodeaux donated to Adolphe Comeau and wife, by notarial act, two small tracts of land, and the improvements upon them, appraised in the Act at twenty-three hundred and twenty dollars, and an inconsiderable quantity of movables, valued at two hundred and sixty-five dollars. He had no other property.

At the conclusion of the Act, the "donees bind and obligate themselves to keep in their own house, respect and treat the donor during his lifetime, with the affection and care due a father by good children."

The donor was aged and without wife or legitimate children. Some of his brothers and sisters, and the descendants of other deceased brothers and sisters, were then, and are now living.

In October 1871 he brought this suit to annul and revoke this donation, alleging that Comeau "had been guilty towards him of cruel treatment, and grievous injuries of every description," and that both donees had "the ill-disguised intention to retain the property donated to them, and to disregard the principal condition of the donation, inasmuch as they have acted, and continue to act towards him in such a way as to render their living together insupportable."

Pending this action, Thibodeaux died, leaving a will which is not in the record, and we can not therefore know whether the testator disposed, or pretended to dispose, of the real estate previously donated, nor whether he gave to his executor seizin of his property. That executor did not qualify, and upon the appointment of a dative executor, this suit was revived in his name.

Thereupon the defendants excepted, that this action could not be prosecuted by an executor—that the action is personal to the donor, or to his heirs, who alone can stand in judgment therein after his death.

The defendants did not require a decision upon their exception, but proceeded to trial on the merits. The case went off however on the exception, which was finally sustained by the court. The plaintiff, executor, now insists that the exception must be considered as waived by the defendants' failure to require the court to rule upon it before passing to the merits. The authorities cited do not sustain that position, nor do we think reason justifies it. The exception is not to the capacity of the executor—not that he is not executor—but that, being executor, he has not authority to prosecute this suit. It would certainly have been more regular, and would have saved time which was uselessly wasted in a trial upon the merits, had the court have rendered on the threshold of the trial the judgment which finally became the subject of this appeal. But the defendants are nevertheless entitled to the benefit of the exception.

In Hart v. Boni, 6 La. 98, the question was, whether the executors of a will can maintain an action to annul a donation *inter vivos*, made by the testator, and the court say, where seizin is given to the executors by the will, they are authorized to bring an action to recover the possession of any property which may have belonged to the testator at his death. If the claim set up be one, which involves the rights of the heirs or legatees, they should, if present, be made parties to the suit, and if absent, their representatives should be brought in. It is also there said, that in countries having laws similar to ours, it has been held, that although executors can not alone maintain an action in relation

to the rights of heirs, they may do so in conjunction with those who are interested in that capacity.

In a later case, Brittain v. Richardson, 3 Rob. 78, it was said, when donations *mortis causa* or *inter vivos* are clothed with all the forms required by law to give them validity, none but forced heirs can sue for their reduction, if they exceed the disposable portion; but it is otherwise, when they are null for want of such formalities, the legitimate heirs of the deceased, or other representatives of the estate having, as well as the forced heirs, an action to have them annulled.

In the present case there is no question of the nullity of the donation for want of any formality, nor of any excess in the donation of the disposable portion, since there are no forced heirs. Neither is the executor's right to maintain this action fortified by his seizin of the property, since in the present instance the executor is not testamentary, but dative.

Marcadé, treating specially of the action of revocation for cause of ingratitude, says, the second paragraph of art. 957 of the Napoleon Code declares expressly, que la révocation ne peut être demandée ni contre les héritiers du donataire, ni par les héritiers du donateurs; l'action est toute personelle, activement et passivement, et doit être intentée par le donateur lui-même contre la personne même du donataire. Mais la loi apporte une exception à ce principe quant aux héritiers du donateur; elle leur permet de continuer l'action quand elle a été intentée par leur auteur. *Exp. du Code Nap.* vol. 3, p. 584.

There is no intimation that the action can be maintained by any one but the heir. It is true the cause of revocation in this case is not ingratitude, but the alleged non-fulfillment of the sole condition upon which the donation was made—the condition being, that the donees should keep the donor in their own house, and treat him through life with the affection of children, and the alleged violation being, that their conduct towards him rendered living with them insupportable.

The present action in revocation is assimilated to that for the enforcement of the resolutory condition in a sale. The property donated is almost exclusively real estate, or that kind of property in which the heir is peculiarly interested, and of which he is the inheritor. No creditor is interested. There are none. *Non constat* but the heirs of an irascible old man would recognize in the kindly attentions of the donees, of which the record bears witness, the evidence of a desire to fulfill the condition, imposed upon or assumed by them, and their determination to do it as far as the impetuosity of his blind anger will permit them.

We think the heirs are necessary parties to an action of revocation of a donation of this kind, and for the causes set up here.

The judge of the first instance so held, but he went further, and gave an absolute judgment, quieting the defendants forever in their pos-

session and title. This is error. The exception was properly sustained, but the defendants are not entitled to a final judgment, nor should the suit be dismissed, but the parties should be remitted to the condition they were in when the donor died. The suit should stand as it then was on the docket, until the heirs become parties either alone, or with the executor. Therefore

It is ordered, and decreed that the judgment of the lower court, in so far as it sustains the exception of want of proper parties, is affirmed, and as to the other part thereof is reserved, and the case is remanded for farther procee lings, the appellees to pay the costs of appeal.

Mr. Justice DEBLANC recuses himself in this cause, having been of counsel.

No. 1021.

STATE EX REL. W. F. SCHWING, DISTRICT ATTORNEY PRO TEM., VS. THEODORE FONTELIEU ET AL.

In a rule taken on a judge to show cause why he should not be recused in a certain suit, personal citation of the defendant, even when served on him in a parish other than the parish of his domicile, is sufficient.

Parties may be sued before whatever tribunal the legislature shall designate.

The act 129 of the Legislature of 1877, touching the recusation of judges, is not in conflict with the constitution of the State.

To a rule taken under act 129 of 1877 on the district judge, and the parish judge of the parish in which a certain suit has been brought, to show cause why both of them should not be recused in the suit, the parish judge is a necessary party to the rule, and the trial of the rule should be continued until he has been cited.

APPEAL from the Sixteenth Judicial District Court, parish of Lafayette. *Mouton*, J.

W. F. Schwing, District Attorney *pro tem.*, *R. S. Perry*, *J. A. Breaux*, and *D. Caffery* for plaintiffs and appellees.

E. Simon for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. This suit is brought before the Sixteenth District Court for the parish of Lafayette. Relators allege that they have brought suit in the Third Judicial District Court for the parish of Iberia, against Theodore Fontelieu, of said parish, to test his eligibility to the office of judge of said district, held by him. That the said Fontelieu, being defendant in said cause, and personally interested therein, is recused, and that T. J. Allison, the parish judge of said parish, is related to said Fontelieu within the fourth degree, and is incompetent to try, and by law recused in said cause. They, therefore, bring this proceeding before the nearest district judge, and pray for a rule on said Fontelieu

and Allison to show cause why they should not be recused and said suit transferred to and tried in the district court in and for Lafayette parish, agreeably to the provisions of act number 129 of 1877. The rule was granted by the judge of Sixteenth District, and the defendants ordered to show cause as prayed for, within three days from service thereof. Judge Fontelieu being at the time in the parish of St. Mary, the rule was served on him personally by the sheriff of that parish.

On the appointed day the defendant, Fontelieu, appeared and filed exceptions as follows:

1. To the mode and place of service of the rule.

2. To the jurisdiction of the district court of Lafayette, on the ground that he was a citizen of Iberia.

3. That act number 129, under which relators proceed, is in conflict with acts 90 and 114 of the Constitution.

The case was twice continued for want of service on Allison. On the seventh May the relators, alleging that Allison was a necessary party and had not yet been served, asked a further postponement to cite him. This was refused and the case taken up, and evidence *pro* and *con* introduced. The judge, thereupon, held that Allison was a necessary party, that the case could not be tried without him, that relators had shown no diligence in causing him to be served, and dismissed the rule as in case of nonsuit. Relators have appealed.

We shall consider, *seriatim*, the various points raised, especially those relating to the constitutionality of act 129, since if that act is unconstitutional the proceeding must be dismissed for that if for no other reason.

1. We do not think that the service of a rule to show cause in a summary proceeding like this must necessarily be made in the parish of the defendant's domicile, except when personal service can not be had. It is sufficient in this class of cases that the service be made in person on the defendant. It would be very inconvenient to hold that rules to show cause must be served in the parish of the domicile, for that would interfere too much with the progress of these summary proceedings. Thus a litigant in the courts of St. Landry, residing in Orleans, though personally present in St. Landry pending the progress of his suit, could not be served personally with any of the many rules that are granted daily in the courts. According to respondent's views, a rule to show cause why testimony should not be read, would, in the case supposed, have to be sent and served at the domicile in New Orleans, if the party had no attorney present, although the party himself were present in the courthouse at Opelousas. We think the service in person on the defendant in St. Mary sufficient. He is deprived of no conceivable right by it, and can not be prejudiced by it.

2. The second objection is without force if the act 129 is the law, since the will of the Legislature is unrestricted in determining where parties may be sued.

3. Is act 129 in contravention of articles 90 and 114 of the Constitution? Article 90 is as follows: "In any case when the judge may be recused, and when he is not personally interested in the matters in contest, he shall select a lawyer * * * to try such case. And when the judge is personally interested in the suit, he shall call upon the parish or district judge, as the case may be, to try the case."

The argument is that the case before us is provided for by this article, and that, therefore, the act 129, providing a different mode of trial, is unconstitutional. It is contended that the district judge in this case being *personally* interested, must call upon the parish judge, who, thereupon, becomes district judge, *pro hac vice*, and who, not being *personally* interested, but only recusable on other grounds, has the power of selecting a lawyer to try the case. We can not accept this view. It is the judge before whose court the case is brought that has this power of selection. The article does not give the substituted judge *ad hoc* any such power. When the parish judge is substituted, there is no more reason to say he has this power of selection, if recused, than for saying that the lawyer has, where he is substituted. Neither of them is *the judge* of that court. They are both mere judges *ad hoc*.

Nor do we think the act is void under article 114, which provides that "every law shall express its object or objects in its title." The purpose of this act is well known. It was to protect the Legislature by making the title of the act declarative of the general purposes of the act, so that on hearing the title read (which is the usual mode of reading acts in legislative assemblies) the members would know the subject matter in a general way, of the bill. The provisions of the act must be germain to the matter specified in the title. We think such is the case with act 129. We, therefore, conclude that said act is constitutional.

We have seen that under said act the parish judge was and is a necessary party to this proceeding. Until he was before the court the case could not be tried. We know no rule of law that justified the district judge in dismissing the suit because he had not been cited. Of necessity the case should have been continued. So far as relates to the convenience of the party who had been cited, the judge should have ordered notice to be given him after service had been effected on the other party of any future fixing of the case. We are not prepared under the facts disclosed in this record to condemn the relators for laches. They did their duty in ordering the process to issue. There is evidence in this record of undue and partisan interest exhibited by some of the parochial officers of Iberia which deserves censure. The judge

before whom this case is pending is by virtue thereof seized of jurisdiction, *quoad* this case, over the officers of Iberia, and it is his duty to force them to do their duty, and in default to punish for the contempt, and even by suspension. District Attorney vs. Richmond, 29 An.

It is therefore ordered and decreed that the judgment appealed from be annulled and set aside, and that this case be remanded to be proceeded with according to law and the views herein expressed..

No. 1000.

URANIE BÉRARD VS. VINCENT BOAGNI.

A depositary may show by parol evidence that the money deposited with him, and for which he had given his written receipt, was composed of certain bank bills.

A depositary is not liable for any depreciation in the value of bank bills deposited with him, unless it appears that the depreciation has proceeded from his fault, or has occurred after he was in default to restore the deposit.

Before a party can be held in damages for failing to do what he has contracted to do, he must be put in default by a written demand, or a verbal demand in the presence of two witnesses.

The obligations of a depositary are prescribed in ten years from the time he is in default for not restoring the deposit.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Hudspeth*, J.

Kenneth Baillio for plaintiff and appellant.

Garland & Dupré for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. Plaintiff sues to recover of defendant $800 and interest from April 1, 1861, being the amount contributed by certain persons for her benefit and received by defendant "on deposit and in trust for her." In the receipt executed by defendant on 1st March, 1861, he acknowledges to have received the amount "for Madame Uranie Bérard." It is also stated therein that the sum is contributed for the purpose of aiding to build or to buy for her a home, or to rent one for her. It is further recited that her receipt shall suffice for the discharge of Boagni, and that his responsibility for the fund shall not extend beyond that of Bellocq, Noblom & Co., of New Orleans, or other house with whom he does business, upon his depositing the same with said house.

The evidence shows, and it is not denied, that the defendant received this $800 in eight $100 bills of the Bank of Louisiana; that he sent these bills to and deposited them with a member of the firm of Bellocq, Noblom & Co., of New Orleans; that at the close of the war these identical bank bills (of which the letter and numbers were preserved by defendant) were returned to him by said firm, and that just prior to the insti-

tution of this suit the plaintiff made a written tender of them to the plaintiff, who refused to receive them.

The discussion in this case has taken a wide range, and it has been argued with zeal and ability on both sides; but under the views we have taken it will not be necessary to enter upon so wide a field. The only questions material for us to consider are:

First—Whether the defendant could show by parol that the deposit with him was not money, but bank-bills.

Second—If so, is he, as depositary, liable for their depreciation in value while in his possession.

First—On the first question, we think that it was competent for him to show the fact that the eight hundred dollars were represented by bank-bills. It has been long established that receipts for money are open to explanation by parol, and that the rules relative to the admissibility of parol to vary or contradict written contracts do not apply. Besides, it is hardly a contradiction to show that the thing received was "eight hundred dollars" in bank-notes. See 5 A. 235; *Ib.* 408; 14 A. 274; 7 N. S. 534; 8 R. 246.

Second—The doctrine is that the depositary is liable for deterioration, and therefore for depreciation, only when it has proceeded from his fault, or has occurred after he was in default to restore the deposit.

There is no pretense that the depreciation of the notes of the Bank of Louisiana proceeded from or is attributable to any fault of defendant. It only remains to inquire, therefore, whether this depreciation took place after defendant was in default to restore the deposit. If he was in default, he is responsible for such loss as resulted thereafter. The plaintiff contends that he was put in default by the terms of his receipt: that the fact that he did not build or buy or rent her a home was a default; that his neglect to restore the fund to her to be used for the purposes intended constitutes default on his part. We can not concur in these views for two reasons:

First—We do not see that the defendant assumed or undertook to build, buy, or rent the house. He simply received and agreed to hold the funds on deposit, contributed for that purpose.

Second—But even had he assumed such obligation, it would have been an obligation to do, and in order to make him liable in damages a formal putting in default, by demand in writing, or in presence of two witnesses, was necessary. C. C. 1911 and 1933. It is not pretended that such demand was ever made. Besides, the present suit is not one in damages for not doing the things for which the contributions were made, but is brought to recover the fund deposited. The things deposited were bank-notes. His obligation as depositary was to keep them, and restore or disburse them when called upon. It can not be asserted that

he failed to do these things. He certainly kept them, the identical bills, as he promised, and there is no proof that any demand was ever formally made for their delivery. In fact, we think no demand, formal or informal, was ever made for these bills.

But, if plaintiff's views be correct, that defendant was in default from April 1, 1861, when it is contended he failed and neglected to do the things with which it is alleged he was charged, then the plea of ten years prescription would apply, for it is manifest that prescription will run in favor of a depositary from the time he is in default to deliver the deposit; so that the plaintiff is placed in this dilemma, that if defendant was in default, as alleged, then prescription has run in his favor. If he was not in default, then he is only bound to restore the deposit, such as it is. This the defendant formally offered to do, before this suit was brought. This tender on his part should relieve him from costs.

The judge *a quo* gave plaintiff judgment for the eight bank-notes deposited, and condemned defendant to pay the costs. We think this judgment correct, except in so far as it condemns defendant for costs.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended so as to condemn plaintiff to pay the costs, and that as thus amended, and in other respects, the said judgment is affirmed.

No. 1032.

WIDOW BRIANT VS. DÉSIRÉE HÉBERT ET AL.

When the signatures of the two sureties of an appeal bond appear at the bottom of the bond, and the name of *one* of them appears in the body of the bond, the bond is good and sufficient.

When the sheriff makes a return of a writ of *fi. fa.*, under which he has seized certain property after the return day of the writ, and retains a copy of the writ, written by himself, it is not necessary that he should append to the copy his certificate of its correctness, in order to enable him to make a valid sale of the seized property. Under such circumstances, the return of the writ after its return day, will not affect the validity of the sale.

APPEAL from the Third Judicial District Court, parish of St. Martin. *Fontelieu*, J.

E. Simon & L. J. Gary for plaintiff and appellant.

Mouton & De Baillou for defendant and appellee.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. The motion to dismiss is based on the ground that the names of the sureties to the appeal are not inserted in the body

of the bond. This ground would be good, if the fact were as stated. There are two sureties, whose signatures are at the bottom of the bond, which is for one hundred dollars, and the name of one of them is inserted in the body of the bond, and that makes it good. The motion is denied.

ON THE MERITS.

The defendant had issued execution on a judgment obtained by him against the plaintiff, and she has injoined the sale under it. The sole ground of injunction is, that the writ of *fieri facias* had expired, and had been returned by the sheriff to the clerk's office, and was there filed subsequent to the expiration of the writ, which fact, the plaintiff alleges, divests the sheriff of all rights of possession of the property, and of all authority in the premises.

The writ issued May 29, 1877. The seizure was made, and notice was served in July, and the property was then advertised for sale—the sale to take place on first Saturday in September. The seventy days which the writ had to run expired on August 8th. On the 11th. of that month the original writ was filed in the clerk's office, with this return written upon it;—"Received the within writ on the 29th. day of May 1877, and duly proceeded to execute the same by levying upon the property of defendant, and the time specified by law for the return of the writ having expired, it is hereby returned unsatisfied after having kept a correct copy of the same."

The position assumed by the plaintiff is, that since the original writ was returned after the expiration of the seventy days, the sheriff was totally divested of authority to proceed further. The fact that the officer had retained a copy does not appear to have been thought material by the plaintiff when she applied for an injunction. Her petition does not allege any informality or vice in the return as ground for the writ. The fact that the sheriff had not returned the writ on or before the expiration of seventy days, it was supposed, invalidated all his subsequent proceedings. The fact that a copy had been retained was known. It was stated by the sheriff on the original, but it was not considered of any consequence, inasmuch as the return was made after the seventy days had expired.

Afterwards, and on the trial, another ground of invalidity was set up in argument, as it is here, viz that the copy of the writ, retained by the sheriff, was not certified by himself.

We do not think either ground tenable. Formerly the sheriff could proceed with the original writ, and was not bound to return it unless required by the plaintiff. Rowley v. Kemp, 2 Annual, 360. Now, when a seizure has been made under a writ of *fieri facias*, and the property

can not be sold before the return day, the officer must nevertheless return the writ, but at the time of making the return, he must make and retain a copy of it, duly certified by himself, and proceed to the sale under the certified copy. Code of Practice, art. 642.

The sheriff in making the return in this case kept a correct copy of the writ, made by himself. The fact that he did not append to this copy his own certificate of its correctness does not invalidate it. The essential matter is that he shall make a correct copy, and retain it, and proceed under it. When the copy is made by himself, his own certificate does not assure its correctness more than the fact that he made it. It is not pretended that his copy was incorrect, and the provision that he shall certify to its correctness is not sacramental, when he makes it himself. The provision is merely directory, and he substantially complies with it when he makes it with his own hand.

Nor is it essential that his return shall be made before, or at the expiration of the time limited for the writ to run. He had done under the original all that was to be done except making the public cry of the property, and the adjudication. If before this exposure for sale, and adjudication, the return is made, and a correct copy is retained, he has in his hands the authority to act, and his sale is legal.

The object of compelling the sheriff to make return of the writ of *fieri facias* within a specified time, was to prevent the future recurrence of a grave abuse of which the sheriffs had sometimes been guilty, and to put it in the power of the plaintiff in execution to control his official conduct thereon. A sheriff might, and sometimes did, fail to proceed under the writ, and as he had it in his own custody, a plaintiff would be ignorant of what his action had been. The statute therefore provided that he should return the writ within a given time, by which means the party interested in its enforcement learned what official action had been taken under it, and if he did not return it, he became liable to the party entitled to the benefit of it for the full amount specified therein. Rev. Stats. sec. 3468.

The purpose of the requirement was then to enable the plaintiff to exercise the surer and speedier control over his process. The defendant was not injured more by having his property sold under a copy than under an original, and the material matter for officer and parties is that the copy shall be correct, so that the particular property seized or directed to be sold shall be the same as that mentioned in the writ, if any special property shall be thus mentioned, and the sum to be realized by the sale shall be neither greater nor less than that specified in the original.

The single ground upon which the injunction was sued out, and its want of force, shews that the process was invoked for delay. The

defendant prays for twenty per centum damages, and ten per centum additional, and one hundred and fifty dollars as attorney's fee. We are not disposed to inflict the heavy damages prayed. The fee of the attorneys is estimated by a witness at one hundred dollars. The judge below dissolved the injunction with ten per centum damages. That is enough.

Judgment affirmed.

MR. Justice DEBLANC is recused in this case.

No. 1027.

DUNCAN GREIG, TUTOR, vs. H. EASTIN, SHERIFF, ET AL.

Minors under the tutorship of their father do not come within the terms of the homestead act.

Property held in indivision can not be the object of a homestead right.

Minors will be held in damages only for the actual expenses of a defendant in injunction, caused by a wrongful injunction sued out by their tutor.

APPEAL from the Sixteenth Judicial District Court, parish of Lafayette. *Mouton*, J.

E. E. Mouton for plaintiff and appellant.

M. E. Girard for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. Plaintiff, as tutor of his four minor children, enjoins a writ for the seizure and sale of their plantation issued to pay a mortgage debt held by G. A. Breaux. The grounds of injunction are, first, that part of the property seized is exempt from sale under the homestead act; second, that the sheriff is proceeding to sell said lands without subdivision into lots of ten to fifty acres.

First—The property seized belongs exclusively to four minor children of Greig, and they hold it in indivision.

They are under the tutorship of their father, and do not come within the terms of the homestead act as persons having others dependent upon them. Property held in indivision can not be the object of a homestead right. See 23 A. 156; 23 A. 783, 832; and Cole vs. LaChambre, not yet reported.

Second—By act 32 of regular session of 1877, approved March 8th, the law (sec. 3451 of Revised Statutes) providing the mode of dividing land into lots was repealed. This act repeals the special laws referred to in art. 654 C. P. We have held that "art. 132 of the constitution is of that class of provisions which remain necessarily inoperative until the mode of giving them effect is provided by statute." Bohn vs. Bossier, 29 A. 146; 24 A. 214. The sale in this case was advertised to take place

on Saturday, 5th May, 1877, nearly two months after the repeal of the law providing the manner of division under art. 132 of the constitution.

There are other satisfactory reasons urged why the plaintiffs are not entitled to the homestead, or to the division into lots, but it is unnecessary to state them.

The judge *a quo* dissolved the injunction but refused to give damages. The defendant and appellee has filed an answer to plaintiffs' appeal praying for damages. The plaintiffs in this cause are minors. Their tutor has abused the equitable writ of injunction; but we are not disposed to visit his sins upon them, beyond what will be a most moderate allowance to the defendant for his expenses and costs. We will allow damages to the amount of five per cent on the amount of principal and interest of the debt enjoined.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended, and that the defendant, G. A. Breaux, do have and recover of the plaintiffs and surety on the injunction bond *in solido*, as damages, five per cent on the amount of judgment enjoined, and as thus amended said judgment is affirmed; appellant to pay costs of both courts.

No. 998.

MARY A. QUERIN, ADMINISTRATRIX, vs. E. CARLIN.

Where a natural tutor, without authority from the court, borrows money for his own account and in his individual name, and expends the money on improvements of a plantation owned in common by him and his minor children, but which improvements were for the use and benefit of a planting partnership in which the minors had no interest, the minors can not be made liable for the borrowed money to the lender of the same.

And a subsequent mortgage of the minors' property to secure such a debt will not be binding, although authorized by the proceedings of a family meeting homologated by an order of court.

APPEAL from the Third Judicial District Court, parish of St. Mary. *Fontelieu*, J.

Fred. Gates for plaintiff and appellee.

D. Caffery for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. E. Carlin owned in common with his eight minor children a tract of land in St. Mary parish; said children owning one half, in right of their deceased mother.

In 1870 Carlin entered into a contract of partnership with Felix Birg, to cultivate this land; Carlin agreeing to furnish the land and supervise the cultivation; Birg to advance the money for that purpose, without interest, etc. It was further agreed that "all buildings, including the

sugar-house and its appurtenances, and fences are to be built at the expense" of Carlin.

It seems that Carlin, from time to time, obtained money from Birg which he used in whole or part in building the sugar-house, and other improvements on the land, until, in May, 1871, the loans by Birg to Carlin amounted to several thousand dollars. Birg became uneasy about the debt, and insisted that Carlin should give him a mortgage to secure it, not only on his own half of the property, but upon that of his minor children, of whom Carlin was natural tutor.

Carlin, thereupon, presented a petition to the probate court, setting out that he owned this property in common with his children; that he had borrowed money from Birg, and expended the same in improving the place, thereby benefiting said minors, and had given Birg his notes therefor. He prayed the convocation of a family meeting to authorize and advise his securing said debt to Birg by a mortgage of the whole property, including that of the minors.

The family meeting was convened, and so advised. Their deliberations were homologated, and Carlin executed the mortgage accordingly, to secure his notes for $3500 given to Birg.

This suit is brought by Birg's administratrix against Carlin to enforce that mortgage. The under tutor of some of the minors, and others of the said children arrived at majority, intervene and oppose the plaintiff, in so far as she seeks to enforce her claim on their half of the property, alleging that they owed Birg nothing, and that the mortgage was granted illegally and without consideration as to them; that the debt was that of their father and not for their benefit, etc. There was judgment for plaintiff, and intervenors and defendant appeal.

There is no doubt that Birg loaned Carlin money, and that considerable sums of this money were expended by Carlin in putting up a sugar-house and other improvements upon the common property. But it is not pretended that in borrowing money from Birg he acted as tutor, or in the name or behalf of his minor children, or that he had any authority whatever from the court so to do. These loans were effected in his own name, from his partner, to carry out his own obligation to put certain improvements upon the property put by him into the partnership. There is no pretense that Birg loaned the money to him as tutor, or on the faith or credit of the minors. This planting partnership was an affair in which the minors had no interest or concern, and were in no way to be profited. It was a speculation of Carlin and Birg's, and the sugar-house was put up that they might profit by it. It was only after disaster stared them in the face that they bethought themselves of saddling half this debt on the minors. Carlin owed Birg. The minors owed Birg nothing. They may or may not owe their tutor;

that will depend upon the extent to which their property has been enhanced in value, and upon the state of accounts between them and their tutor. There is evidence in this record tending to show that their tutor owed them largely—far more than they could ever owe him for these improvements of their property. It being clear, therefore, that the minors owed Birg nothing, and rendered more than probable that their father owed them far mote than would re-imburse him for useful improvements, there was no foundation or basis for a mortgage upon their property. They could not be thus made security for his debt to Birg. The law does not allow such a transaction between a tutor and his wards. Even if the ward owes the tutor the latter can not enforce the debt until the tutorship expires. What he can not do himself he can not do by interposing his creditors, or by subrogating them to his rights. The very best phase that can be put upon the facts of this case for plaintiff, would be that the minors owed Carlin, and that he owed plaintiff. But, as we have seen, a tutor's rights are not executory against the minors pending the tutorship, and can only be ascertained and become executory on final settlement of the tutorship. Besides, it does not follow that because a tutor has expended a given amount of money in constructing buildings upon his wards' property that, therefore, he is to be credited with that amount. The expenditure must be useful and beneficial. It is easy to see that a minor's estate might be absorbed and swallowed up by injudicious and unauthorized improvements beyond his means and ability to pay. Such improvements, while costing thousands, might in reality bankrupt instead of enhancing his fortunes. Once admit the right of a tutor to "*improve*" *ad libitum*, and there is an end of protection for the ward. Upon the face of the tutor's application in this case, the family meeting and the court should have refused the authority to mortgage the minors' property. Even when the forms of law have been complied with, courts will look behind them to protect minors from loss in matters of contract. C. C. 1866 and 1867. Those who deal with minors must, at their peril, be prepared to vindicate the *bona fides* and justice of their demands.

It is therefore ordered, adjudged, and decreed that the judgment appealed from, in so far as it rejects the demands of intervenors and subjects their half of the property in question to plaintiff's debt and mortgage, be annulled, avoided, and reversed; and it is now ordered that the opposition of intervenors be sustained, and that they have judgment against plaintiff, and that their half of said property be decreed not subject to the debt and mortgage asserted by plaintiff.

It is further ordered that intervenors recover of plaintiff the costs of their intervention in both courts. That in other respects said judgment is affirmed.

No. 1011.

THE STATE VS. SARRAZIN BAKER.

The State has a right to ask the jurors in a criminal case, whether they have conscientious scruples against finding a verdict which would entail capital punishment.

A witness in a criminal case may be recalled, even after he has been examined and cross-examined.

On the trial of an accused for murder no specific act of the deceased, unconnected with the killing, is admissible in evidence.

The crime of manslaughter is prescriptible in one year from its commission.

The entering of a *nolle prosequi* by the State's Attorney, on a motion to quash an indictment amounts to a voluntary abandonment of the prosecution, in which case the indictment will not have the effect of interrupting prescription.

APPEAL from the Sixteenth Judicial District Court, parish of Lafayette. *Mouton*, J.

Joseph A. *Chargois*, District Attorney, for the State.

M. E. Girard for defendant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. The State moves to dismiss this appeal for diminution of the record. The missing papers have been brought up in a supplemental transcript. The defendant would have the right to a *certiorari* to complete the record, but he has saved the Court and himself time in supplying what is missing, and there is no pretence that these are not the papers which would come up in answer to a certiorari.

The motion to dismiss is denied.

ON THE MERITS.

Upon an indictment for murder the defendant was convicted of manslaughter, and sentenced. His appeal is based upon three bills of exception, and the plea of prescription, the latter being filed in this court.

1. Three jurors, answering upon their *voir dire*, were asked if they had conscientious scruples against finding a verdict which would entail capital punishment. The prisoner objected to the question, but the Court allowed it, and the Court was right. The State has as much a right to a fair and unbiassed trial as has the prisoner. The State is vitally interested not only that offenders against her laws shall be punished in some way, but that they shall be punished in the way she has prescribed, and she has the right to know of a juror whether he has already determined not to punish in one of the modes she has provided, under the pretext of a tenderness of conscience which yearns towards the criminal

and not to society. The question was properly permitted to be asked. State v. Melvin, XI Annual, 535. State v. Nolan, 13 Annual, 276.

2. Before the State had closed its evidence, a witness was recalled who had already been examined and cross-examined. The prisoner objected to any further examination of this witness, but the court allowed it.

This practice has obtained too long to be disallowed now. State v. Duncan, 8 Rob. 562. State v. Colbert, 29 Annual, 715.

3. The prisoner offered his mother as a witness to prove that the deceased had attempted on the day before the homicide to have carnal knowledge of her against her will. The State objected on the ground that evidence of character of the deceased is inadmissible.

The objection to the testimony is not put on the proper ground. The evidence was not of the character of the deceased, but of a specific act done by him, and its object was doubtless to shew that it was an incentive or inducement to the commission of the homicide, but there is nothing to connect it with that act. In the oft repeated language of the books, it did not form part of the *res gestæ*, and was properly excluded.

Last, as to the plea of prescription.

The offence of manslaughter is prescriptible in one year. The homicide was committed on June 7, 1871, and a bill was found in October of the same year. A motion to quash was made by the prisoner, and a similar motion having been sustained in other cases, a nolle pros. was entered on April 22, 1874. On the same day the Grand Jury found another bill, and on another motion to quash being made July 26, 1875, another nol. pros. was entered in October following, and immediately thereafter a third bill was found, and under it the conviction was obtained.

The State contends that there was not a voluntary abandonment of the prosecution under the first bill. The court had sustained a similar motion to quash in other indictments against other prisoners, and the District attorney therefore entered a *nol. pros.* in this without provoking a decision upon the motion in this case. He should have had the court to rule on the motion of the prisoner in this case.

But when the motion to quash the second indictment was made, the State again entered a *nol. pros.*, and this time solely because the prosecuting officer was satisfied it would be sustained. Here was a voluntary abandonment of the prosecution, and the plea of prescription, interposed by the prisoner, is effectual for his protection.

We are referred to the State v. Cason, 28 Annual, 40, where the doctrine is broadly asserted that, if the prosecuting officer finds that the indictment is defective, he can enter a *nol. pros.*, and proceed under a new indictment, although more than a year has elapsed from the com-

mission of the crime to the finding of the new bill. We are constrained to overrule that decision, since it does not accord with the established rules in criminal procedure. The opposite doctrine was asserted in State v. Thomas, 29 Annual, 301, and we reaffirm it.

We are asked by the State to remand the case, in the event we shall hold the plea of prescription to be good, and we shall take that course to enable the State to shew acts, or proceedings, or other matter, which may have interrupted prescription, or avoided its effect. Therefore

It is ordered and adjudged that the verdict of the jury is set aside, the judgment of the lower court thereon is avoided and reversed, and the cause is remanded to be proceeded in, and for a new trial of the prisoner, who is ordered to be retained in custody to await the same.

No. 981.

HONORÉ MÊCHE ET AL VS. D. LALAMIE, ADMINISTRATOR.

Before the creditors, or the administrator of a deceased vendor who has sold certain real estate by an act under private signature, can annul the act as simulated, it must appear that it injured the creditors, and that their debts existed before the execution of the act.

The oath of an intervenor, going to show the nature and amount of his claim, is not admissible in evidence when filed for the first time in this court.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Hudspeth*, J.

A. Bailey for plaintiffs and appellees.

Jas. M. Moore for defendant and appellant.

Jno. N. Ogden and *Kenneth Baillio* for intervenor.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs in this suit, the children and heirs of Hypolite Mêche, deceased, late of the parish of St. Landry, alleging themselves, as heirs aforesaid, to be owners of certain movable property in the possession of defendant, as the administrator of the estate of one Thomas Moore, deceased, late of said parish, seek to recover the same from the defendant. Their demand to be declared owners, and to be put in possession thereof, is accompanied by a writ of sequestration.

The answer of defendant to plaintiffs' petition is a general denial, an averment that the property had always been in the possession of the deceased, Moore, and that the pretended act declared on was fraudulent and simulated. Mrs. Alfred Moore intervened, alleging that she was a privileged creditor of the estate of Thomas Moore, for a large amount, and an ordinary creditor for a considerable sum; but she specifies no

amounts whatever. She joins the defendant, and prays that plaintiffs' demands be rejected.

Upon these issues the case was tried. The district judge, after an able and exhaustive review of the facts and law of the case, gave judgment for plaintiffs, and the defendant and intervenor appeal.

The basis of plaintiffs' claim is an act of sale, *sous seing privé*, of date May 1, 1871, whereby Thomas Moore sells to Hypolite Mêche, for $1550 cash, the property in controversy; consisting of improvements on a certain tract of land, and a lot of cattle, horses, and other stock. This act appears to have been recorded, but the date of its registry is not given. On the trial it was offered and received in evidence without objection. We think that its execution is sufficiently proven by the testimony of Simeon Richard and Honoré Mêche, two of the attesting witnesses. Its date is also shown, inferentially, to have been about that which it bears, by the testimony of Honoré Mêche, who says that about *five* years ago he worked a piece of the Thomas Moore land—that this was *after the sale* to Hypolite Mêche by Moore. It also appears that this property was for several years assessed to Mêche—that his son worked part of it without rent, and rented out part of it to one Willis. It is also shown that Moore on several occasions declined to give in the property for assessment as his, saying it belonged to Mêche, and repeatedly stated that Mêche was its owner. It is also shown that prior to this sale Mêche paid some considerable debts of Moore's, and that on the day of sale he paid him quite an amount in cash.

On the part of the defense it is shown that Moore continued in the possession of the property sold, but, it seems, disclaimed ownership, saying that Mêche let him use it for a livelihood. Mrs. Alfred Moore, the cook and housekeeper of Thomas Moore, and, we are informed, an ignorant colored woman, testifies to various declarations of Moore and one Trask among themselves going to show that the sale was a simulation. In fact, in this case as in all others like it, there is much contradictory swearing; and it would be unsafe for this court, which has no personal knowledge of these witnesses, and did not hear their testimony, to undertake, without grave reasons, to say that the learned judge of the court below erred in weighing their testimony.

In fact, the only circumstance in the case which in our opinion seriously militates against plaintiffs' demand is the continued possession of Moore. But this is a contest between the estate of Moore, who was the vendor, and Mêche, the vendee. The rule is that, as between the vendor and his heirs not forced and the vendee and his heirs, a counter letter is the only evidence admissible of simulation. True, the creditors of the vendor and, therefore, his administrator, may, by alleging and proving injury to themselves, criticise and attack the sale as simulated, and

resort to parol proof of it. But before a creditor of the vendor can annul his acts as simulated it must appear that it injures the creditor, and that his debt existed before the execution of the act complained of.

We have examined with care the evidence in this case, and think that the conclusion of the district judge should be maintained. He properly dismissed the intervenor, who neither alleged nor proved any specific amount of indebtedness. Of course, no evidence can be received in this court. Hence, the oath of the intervenor as to the nature and amount of her claim, filed for the first time in this court, must be disregarded.

It is therefore ordered, adjudged, and decreed by the court that the judgment appealed from be affirmed with costs of both courts,

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ON REHEARING.

MANNING, C. J. A careful reconsideration of our former decree has not shaken our confidence in its correctness, and therefore

It is ordered and adjudged that our former decree remain undisturbed.

No. 997.

SUCCESSION OF MARIA BAUMAN. ON OPPOSITION OF HEIRS.

While administrators and executors must sustain the charges set forth in their accounts, the kind and degree of proof vary according to other facts which may be proved, or which appear on the face of the papers. There is a presumption in favor of the correctness of an executor's account whose general management evinces fidelity and integrity.

Heirs who occupy a portion of the succession property are liable to the succession for the rents of such property, during their occupancy.

APPEAL from the Parish Court of Iberia. *Allison*, J.

Jos. A. Breaux and *W. F. Schwing* for opponents and appellants.

R. S. Perry and *W. S. Haase* for executor and appellee.

ON OPPOSITION OF HEIRS.

The opinion of the court was delivered by

MANNING, C. J. John Fisher was appointed and qualified as executor of Maria Bauman's will. He was also one of her heirs. The property consists of improved lots in the town of New Iberia, which were inventoried at $7,350. He has filed three accounts, to which two of the heirs presented as many separate oppositions. The grounds of opposition are numerous, and evidently designed to put him to the proof of his whole gestion. Some of them were that the rents, due and

uncollected, were not accounted for—that rents which ought to have been obtained, and were not, should be charged to him—that the sums paid for repairs, etc. are excessive, and were not owing by the property—that he paid his lawyers too much, and ought not to have paid them at all out of the succession funds, but out of his own—that he can not retain the sum due ($1156.50) for rent by some of the heirs, or remit to them what should be paid on that account, etc.

It is quite impossible, and would be improper, to go through these accounts in this opinion item by item, and state the charge, the proof, and its effect. The vouchers and the oral testimony of the executor are very complete, and in our judgment substantiate the account in its entirety. Besides which, we meet in this case what we had placed before us in another case at this term—two whole transcripts of other cases offered, we are informed, to prove *rem ipsam*. The fact could so easily have been stated under the form of a joint admission that we are not inclined hereafter to permit this mode of burthening the court with unnecessary labour.

It is very easy for persons, who have had nothing to do with the practical management of an estate, to conceive sundry ways in which its revenues might and ought to have been increased, and its expenses diminished. This house did not rent for what might have been obtained for it, or that house was shut up when a tenant might have been had. The sum charged here for repairs is excessive, and that charged there was uselessly expended. But all who are familiar with the management of successions in the last few years, either as executor or lawyer, know the many and serious embarrassments, and hindrances, that have existed to the successful gestion of an estate. The executor of Mrs. Bauman has shewn more than ordinary care, judgment, and diligence, in the collection of the small rents for each lot, and as a whole, his administration thus far is not fairly liable to attack.

There is some question as to the proof of some of the items—its sufficiency, completeness, etc. An executor must sustain his charges by proof, but the kind and degree of proof varies according to other facts which may be proved, or which appear on the face of the papers. For instance, an executor whose general management is characterized by fidelity and integrity, will have a presumption raised in his favor of the correctness of his account, and many items charged by such a representative of a succession will be admitted and approved upon slenderer proof than would be required of one who had by his conduct exhibited the purpose to administer for his personal benefit, instead of for that of those who are entitled to the succession, and who had united negligence to rapacity in dealing with the property and funds of the succession.

The appellee prays the amendment of the judgment, so as to decree

that the heirs are not responsible for rents. Some of the heirs occupy some of the houses. It would be unjust and unequal to permit these to use portions of the property free of charge, while other heirs are not using any part of the property. And there are probably not two heirs who are using property of same value. The rent of the house used by one may be much larger than the rent of that used by another. The heirs should account for the rents when the final settlement is made. The rents are to be considered as so much advance paid to the heirs by the executor on each of their portions.

The judgment of the lower court is correct, and it is affirmed.

No. 992.

W. C. TEAL ET AL. VS. OSCAR S. LYONS ET AL.

A reconventional demand must set forth the claim of defendant with the same precision as would be required in a petition for the same cause of action, and a mere reference in his answer, to a former suit brought by the defendant, does not make the allegations of the petition in that suit a part of his answer.

When the offsetting claim set up by the defendant is wholly independent of, and distinct from the claim of the plaintiffs, the mere fact that *one* of the plaintiffs is in another parish from the one in which the suit is brought, will not authorize the defendant to plead his claim in reconvention.

Where property wrongfully attached is lost while in the sheriff's keeping, the owner is entitled to recover its full value from the plaintiff in attachment, and his sureties. If no malice is shown in the plaintiff, the owner is only entitled to full reparation for the actual damage he has suffered.

APPEAL from the Eighth Judicial District Court, parish of Calcasieu. *Hudspeth*, J.

Geo. H. Wells for plaintiffs.

L. Leveque and *F. Perrodin* for defendants.

The opinion of the court was delivered by

MARR, J. On the tenth March, 1874, Lyons brought suit against Teal and Nicholls; and, under art. 240, number four of the Code of Practice, he caused process of attachment to issue, under which the sheriff seized one thousand logs, "more or less," lying in the Hickory Branch of the Calcasieu, and placed them in charge of a keeper.

Pending the suit a flood carried off the greater part of the logs, some of which were collected and secured by the keeper. Plaintiff represented to the court that the logs were perishable; and obtained an order that they be sold for cash, and the proceeds retained by the sheriff to abide the result of the suit. The sheriff advertised for sale 700 logs, "more or less;" and he actually sold 399, for $540 96.

On trial on the merits, the court rejected the demand of Lyons

as in case of nonsuit; and dissolved the attachment, reserving to the defendants the right to sue on the attachment bond for damages. This judgment was affirmed on appeal, 28 An. 592; and this suit was brought against Lyons and Smart his surety to recover of them, *in solido*, the full amount of the bond, $1125, and against Lyons alone the additional sum of $343 56, damages for the wrongful issuing of the attachment.

Defendants plead the general issue; "and Oscar Lyons, one of the defendants, re-averring, as in his original petition, and praying as therein prayed for, they pray that plaintiffs' demand be rejected at their cost, and for general relief."

A few days after defendants offered an amended answer, alleging that plaintiffs were indebted to Lyons in the sum of $736, and praying judgment for that amount, with interest, "as claimed in his original petition." This was followed by a second amended answer, alleging the indebtedness of plaintiffs to Lyons in the sum of seven hundred and thirty-six dollars, "which they hereby plead in reconvention." They also allege that Teal, one of the plaintiffs, is a resident of the parish of St. Landry.

Both these amendments were disallowed by the court; and we think correctly. A reconventional demand must set out the claim of defendant with the same precision as would be required in a petition for the same cause of action; and a mere reference to a former suit does not make the allegations of the petition in that suit part of the pleading in which it is so referred to. The indebtedness of Teal and Nicholls to Lyons is wholly independent of and distinct from the claim of Teal and Nicholls against Lyons and his surety for the wrongful issuing of an attachment. The suit was pending in the parish of Calcasieu, the residence of Lyons and Smart, and of Nicholls, one of the plaintiffs; and the fact that Teal, one of the plaintiffs, resided in St. Landry does not authorize the defendants to institute a reconventional demand against Nicholls and Teal. C. P. 374, 375.

The judgment of the district court was in favor of plaintiffs for $540 96, the value of the logs actually sold by the sheriff, and $75, for attorney's fees in the attachment suit; and on the same day, on rule taken by plaintiffs on the sheriff, and upon his confession, judgment was rendered against him for the $540 96, less $25, paid, with stay of execution for six months, the $25 paid, and so much of the remainder as might be paid to be applied by plaintiffs to the satisfaction of the judgment in their favor against Lyons and Smart.

Both parties appealed from the judgment in favor of plaintiffs against Lyons and Smart; and plaintiffs, in answer to the appeal of defendants, pray that the judgment be so amended as to allow them the additional sum of $751 25, the value of 601 logs, at $1 25 per log, they

claiming that the whole number seized under the attachment was 1000, of which the 399 sold by the sheriff were part.

The testimony is not satisfactory as to the number of logs seized by the sheriff; and his keeper could not state the number. No doubt Teal and Nicholls had as many as 1000 logs; but it is by no means clear that there was that number at the mouth of the Hickory Branch; and none others were taken into possession by the sheriff or his keeper. The district judge heard the numerous witnesses; and he concluded that the plaintiffs were entitled to recover only for the 399 actually sold by the sheriff. The testimony leaves the impression on our minds that there must have been between 800 and 1000 logs in the lot seized by the sheriff. Some of the witnesses say not less than 1000, one says 900 to 1200. Whether all that were seized by the sheriff were carried off by the flood, or part only, we can not determine; but the greater part of them certainly floated off. Some of them were recovered, but strange to say, the testimony does not fix the number. The plaintiffs are clearly entitled to full reparation for the damage caused them by the wrongful issuing of the attachment; but they are entitled to nothing more, because there is neither allegation nor proof of malice or other bad motive on the part of Lyons.

The sheriff's return shows that he supposed he had seized 1000 logs; but he did not take the trouble to count them, nor to have them counted, and he qualifies the return by the words "more or less." When he advertised the logs for sale, he did not know how many had been or would be recovered; and he states the number to be sold at 700, "more or less." We think we may fairly assume that 700 will not be in excess of the number of which plaintiffs were deprived by the attachment: that is, the 399, actually sold, and 301, lost; and that plaintiffs are entitled to recover the value of the 301, at $1 25 per log, proved to be the average price.

With respect to the 399 logs sold by the sheriff, plaintiffs might have pursued the sheriff for the proceeds in his hands, and have obtained judgment against him, with interest from the date of default on his part; and they might also have obtained judgment against Lyons and his surety for the value of these logs; but they could have but one satisfaction.

By proceeding against the sheriff, they ratified the sale made by him; and they could have claimed no more than the proceeds of Lyons and Smart, as the value of those logs. The sheriff was entitled to no delay or indulgence. He is bound to be always ready to pay, at once, to the party entitled, money received by him in his official capacity; and when plaintiffs, instead of compelling the sheriff to pay, immediately granted him a stay of execution for six months, they

treated and dealt with the money in his hands as their own; and subjected Lyons to the risk of the loss of that amount. Probably the sureties of the sheriff would claim to be released by this indulgence.

We think the defendants are liable for the value of the 700 logs, with interest from judicial demand, by which they were put in default; and $75 for attorney's fees, subject to a credit of $540 96, on the twenty-fourth March, 1877, the date of the judgment granting stay of execution to the sheriff.

The value of the 399 logs is fixed at $540 96: the value of the 301, at the average price $1 25, is $376 25, in all $917 21: to which add the $75 for attorney's fees, the total is $992 21, on which plaintiffs are entitled to legal interest from judicial demand, September 7, 1876: say up to March 24, 1877, six months seventeen days, $27 12, in all $1019 33. Deduct the $540 96, March 24, there remains a balance of $478 37.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be so amended as to read as follows, and decree: That plaintiffs, William C. Teal and Lewis M. Nicholls, do have and recover of and from the defendants, Oscar S. Lyons and William W. Smart, his surety in the attachment bond, *in solido*, the sum of four hundred and seventy-eight dollars and thirty-seven cents ($478 37), with interest at five per cent per annum from the twenty-fourth March, 1877, until paid: and that, as thus amended, the said judgment be affirmed, with costs.

No. 1019.

PARISH OF IBERIA VS. R. A. CHIAPELLA.

Property situated within an incorporated town, and the inhabitants of the town, are subject to the imposition of property and license taxes by the police jury of the parish, unless specially exempted by some act of the Legislature.

APPEAL from the Second Justice's Court, First Ward, parish of Iberia. *Ratier, J.*

W. F. Schwing, District Attorney, for plaintiff and appellant.

Jos. A. Breaux for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. Can three licenses and three taxes be imposed and levied—within the limits of an incorporated town—on a retail merchant residing in that town—one by the State, one by the parish and one by the authorities of the corporation? This is the question presented in this case.

The defendant is a resident of the town of Jeannerette, which was

incorporated by an act of the Legislature, approved on the 15th of March 1878, and that town is a portion of the parish of Iberia. He has paid to said town, as retail merchant, a license of fifteen dollars, and—besides—a five-mill tax on the assessment of his stock in trade. He declines to pay to the parish of Iberia an additional tax and an additional license. He contends that there is no law which expressly authorizes the police jury to levy a tax on "stock in trade," and that he can not, justly, be compelled to assist in defraying the expenses of two local governments, that of the town and that of the parish.

Under section 2743 of the Revised Statutes, "police jurors have authority to levy such taxes as they may judge necessary to defray the expenses of their respective parishes, and their jurisdiction extends over all the parts of said parishes, not expressly exempted."

15th A. 445.

In the case of Victor Maurin et als. vs. the Tax Collector of Ascension, this court said: "the question in this suit is whether or not parish taxes can be collected from owners of property situated in an incorporated town, when such property is not expressly exempted by law from such tax, and the police jury is vested with power to assess taxes upon the ordinary objects of taxation.

"We consider this not an open question. 13 A. 420—19 A. 99. Unless the property within an incorporated town is expressly exempted by law from a parish tax, the general power conferred on the police jury of the parish to assess a tax on all ordinary objects of taxation will reach such property."

25th A. p. 445.

"That question is one of intent, and in ascertaining such intent it will not be presumed that the Legislature intended to restrict or diminish the power of taxation delegated to any subdivision of the State, unless such intent be plainly expressed."

Burroughs on Taxation, p. 387-388. 9 A. 305. 11 A. 68. 20 A. 283. 26 A. 151.

In the act incorporating the town of Jeannerette, no such exemption is to be found, and—it is probable—the statute of 1878 cited by defendant and directing the levy of a tax in and out of incorporated towns, to defray the expenses in criminal proceedings, was passed for the sole purpose of subjecting to that special tax the towns which—previously—were exempt from such taxation. The repealing clause of the statute so indicates.

Act of 1878, p. 144.

Defendant complains that the tax and license thus imposed upon him and his property are not equal and uniform. They are, so far at least as the parish of Iberia is concerned; and—if any one of the three

licenses and taxes were unconstitutional, it would be the last of the three, that imposed by the newly incorporated town.

We think—with a French economist—that "taxes should be like those light vapors which the sun draws from and returns to the earth in fertilizing dew," and entertain no doubt that, on proper application, the Legislature would not hesitate to extend to the town of Jeannerette the advantages and exemptions which have been extended to nearly every town of the State. Until then, the law must be applied as it is.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed.

It is further ordered, adjudged and decreed that the parish of Iberia do have judgment against and recover of R. A. Chiapella the sum of twenty five dollars, amount of his parish license and tax for the year 1878; and the lien and privilege securing the payment of said amount is hereby recognized: the costs in both courts to be paid by defendant.

No. 1023.

SUCCESSION OF JACOB ANSELM. OPPOSITION OF A CREDITOR.

The filing of an amended opposition to a tableau of distribution will not be permitted, when it prays the court to do the very reverse of what the same opposer, in his original opposition, has judicially admitted ought to be done.

APPEAL from the Parish Court of St. Landry. *Fontenot*, J.

H. L. Garland for administrator and appellant.

B. A. Martel for opponent and appellee.

The opinion of the court was delivered by

MANNING, C. J. Jacob Anselm died in 1862, and Cleophas Comeau was appointed his administrator the following year. No tableau of classification of the debts, nor of distribution of the assets, of the succession was made until 1872. Meanwhile Charles Thompson had sued the succession upon certain notes of the deceased, given for the purchase price of a frame building, and had obtained judgment for eleven hundred and eighty six dollars and 37 cents, with interest for several years, subject to a credit of $250, with recognition of his privilege as vendor upon the fund in the administrator's hands, which was produced by the sale of the building. All the property of Anselm had been sold under order of court for the payment of debts, and this building of which Thompson was the vendor to him, brought seven hundred dollars at the succession sale.

On appeal, the judgment for the moneyed demand was affirmed,

but the recognition of the vendor's privilege was stricken out, and the case was remanded to ascertain whether it had been preserved.

When examined on the trial of this opposition, it was ascertained the privilege had not been recorded, and was therefore lost as to third persons—other creditors of the succession—who were contesting Thompson's claim to the fund. The administrator did not place Thompson on his tableau as a privileged creditor, but after distributing the funds among the privilege and mortgage creditors whom he did recognise, apportioned what was left among the ordinary creditors, so that Thompson was allotted only $340.40. He opposed the tableau, because he was not placed thereon for the amount of his judgment, with a privilege on $700, the fund produced by the sale of the building, to the exclusion of all other creditors; and prayed that the tableau be amended in that respect, and as thus amended, that it be homologated. This opposition was filed in March 1872.

Four years later, in February, 1876, Thompson presented another opposition, or amended the original, pleading prescription to all or several of the mortgage notes of deceased, which had been recognized on the tableau as mortgage notes, and among the holders of which, the administrator had proposed to distribute the funds in the manner already stated. The maintenance of this plea would of course so far diminish the consumption of the funds of the estate by the mortgage claims as to leave probably enough to pay the ordinary creditors in full.

Objection was made to the filing of this amended opposition upon the ground that it changed the issue, and altered the substance of the demand in opposition, but the court overruled the objection, and permitted it to be filed, because the plea of prescription can be filed at any time. The administrator reserved a bill to this ruling.

The true ground of objection to the filing of the amended opposition is, that it is in contradiction to the original—that what it prayed the court to do, is the reverse of what the same party had judicially admitted ought to be done. The concluding sentence of the original opposition was, a prayer that the tableau should be homologated after it was amended in the single particular mentioned, and therefore the opponent had prayed that all these mortgage notes, classified and recognised on the tableau as valid and subsisting claims, and as entitled to certain specified portions of the assets, should be paid in the manner, to the extent, and with the fund, set forth on the tableau of distribution. All that the opponent complained of then, was the refusal of the administrator to admit the existence of his privilege upon a certain fund, and thereby assure to him the whole of that fund. He opposed only that feature of the proposed distribution of assets, but if he had gone no farther, the plea of prescription would have been available to him. He

could have made it, and if he could have sustained it, his claim was safe. But he expressly prayed that, after the tableau was amended in the one particular, every thing upon it should be approved. And the mortgage notes were on it, classified in their rank, and assets assigned to them sufficient for their payment.

It is indisputable that prescription can be pleaded even here, at any time before a cause is submitted to the Court, but the question here is, not as to the time when prescription may be pleaded, but whether that, or any other plea, can be heard which runs counter to what the pleader has in the same contestation judicially demanded of the Court to do. It has been uniformly held that a party is bound by his admissions made, and demands preferred, in judicial proceedings. Civil Code art. 2270 new no. 2291.

The judge below amended the tableau in sundry particulars. There was no opponent but Thompson, and some of the amendments made were not prayed. There was no contest over the items, as the administrator had ranked them. A tableau or an account can only be amended in the items opposed. If all parties agree that they shall remain as classified, the Court need not disturb them.

It is therefore ordered and decreed that the judgment of the lower court is avoided and reversed, and that the tableau presented by the administrator is now approved and homologated, and that the opponent pay the costs of his opposition in the lower court, and of this appeal.